SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

APRIL 20, 2012

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

HON. SALVATORE R. MARTOCHE, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1349

CA 11-01241

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, GREEN, AND MARTOCHE, JJ.

IN THE MATTER OF WALGREENS, PETITIONER-APPELLANT,

V ORDER

BOARD OF ASSESSMENT REVIEW, AND/OR ASSESSOR OF TOWN OF IRONDEQUOIT, AND TOWN OF IRONDEQUOIT, RESPONDENTS-RESPONDENTS.

STAVITSKY & ASSOCIATES LLC, CLIFTON, NEW JERSEY (BRUCE J. STAVITSKY OF COUNSEL), FOR PETITIONER-APPELLANT.

DAVIDSON FINK LLP, ROCHESTER (THOMAS A. FINK OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered November 16, 2010. The order granted the motion of respondents to preclude petitioner from submitting trial-ready appraisals and from offering expert testimony on the value of the subject property.

Now, upon the judgment and order of Supreme Court, Monroe County, entered March 2, 2012, approving the Settlement Agreement signed by the attorneys for the parties on January 26, 2012 and February 15, 2012, discontinuing the proceedings,

It is hereby ORDERED that said appeal is dismissed without costs upon stipulation.

All concur except GREEN, J., who is not participating.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

310

KA 08-00865

PRESENT: SCUDDER, P.J., SMITH, CARNI, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LESLIE BLAIR, ALSO KNOWN AS JAHMAN, ALSO KNOWN AS DRED, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES ECKERT OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), rendered February 15, 2008. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of murder in the second degree (Penal Law § 125.25 [3]). Defendant contends that Supreme Court improperly questioned him when he testified on his own behalf and that he was deprived of a fair trial thereby. Defendant failed to preserve that contention for our review (*see People v Charleston*, 56 NY2d 886, 887). We conclude, in any event, that defendant's contention is without merit. Indeed, the court properly acted within its power "to encourage clarity . . . in the development of proof," without giving any impression with respect to its own view of "the credibility of the testimony of any witness or the merits of any issue in the case" (*People v Moulton*, 43 NY2d 944, 945; *see People v Arnold*, 98 NY2d 63, 67-68). Defendant further contends that the court abused its discretion in overruling defense counsel's objection concerning the scope of the redirect examination of a witness by the People. That contention lacks merit, inasmuch as defendant opened the door to the redirect examination by only partially exploring on cross-examination the issue whether the witness and defendant had engaged in criminal activity together in the past, rendering further examination and clarification on that issue appropriate (*see People v Massie*, 2 NY3d 179, 183-184; *People v Melendez*, 55 NY2d 445, 451; *People v Alvie J.*, 286 AD2d 930, 931).

Finally, defendant failed to preserve for our review his

contention concerning the allegedly improper introduction of evidence of prior bad acts committed by him. In any event, we conclude that any error in the admission of that evidence is harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242). The evidence of defendant's guilt in assisting in the murder is overwhelming, and there is no significant probability that defendant otherwise would have been acquitted (*see id.*; *People v Orbaker*, 302 AD2d 977, 977-978, *lv denied* 100 NY2d 541). The overwhelming evidence included the scar from a gunshot wound in the webbing between defendant's thumb and forefinger, the gunshot wound to the right front of the victim's neck, and defendant's admission to an acquaintance following the shooting that he was holding down the victim when the gun wielded by another participant discharged (*see generally People v Breland*, 83 NY2d 286, 292-293).

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

405

TP 11-01530

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ.

IN THE MATTER OF RAMON ALVAREZ, PETITIONER,

V MEMORANDUM AND ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT.

RAMON ALVAREZ, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [John L. Michalski, A.J.], entered July 26, 2011) to review determinations of respondent and for injunctive and declaratory relief. The determinations found that petitioner had violated various inmate rules and transferred petitioner to Gowanda Correctional Facility to attend a sex offender counseling and treatment program.

It is hereby ORDERED that the determinations are unanimously confirmed without costs and the petition is dismissed.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determinations, following two separate disciplinary hearings, that he violated various inmate rules. He also seeks to challenge a determination transferring him into a sexual offender counseling and treatment program (SOCTP) and the denial of a grievance in which he alleged that he was denied medical attention after he was allegedly assaulted by correction officers. With respect to the relief requested for the SOCTP transfer, petitioner sought an order annulling that determination and returning him to his status before he was placed in the SOCTP facility. Even assuming, arguendo, that the petition raised a substantial evidence issue and thus that the proceeding was properly transferred to this Court (*see Matter of Grant v Prack*, 86 AD3d 885, 886 n), we note that petitioner in his brief to this Court does not raise a substantial evidence issue. We thus deem abandoned any substantial evidence issue (*see Matter of Lineberger v Bezio*, 89 AD3d 1293, 1294; *Grant*, 86 AD3d at 886 n).

On December 17, 2010, petitioner was served with a Tier III misbehavior report (first MBR) alleging that he violated rules 101.22 (7 NYCRR 270.2 [B] [2] [v] [stalking]), 106.10 (7 NYCRR 270.2 [B] [7]

[i] [refusal to obey orders]), and 107.10 (7 NYCRR 270.2 [B] [8] [i] [interference with an employee]). Petitioner's contention that he was denied an employee assistant is not properly before us inasmuch as it was not raised in the petition (*see Matter of Pigmentel v Selsky*, 19 AD3d 816, 817; *Matter of Crawford v Kelly*, 124 AD2d 1018). In any event, his contention lacks merit. Petitioner signed a document waiving the right to an employee assistant, and he has demonstrated no prejudice resulting from the lack of such an assistant (*see Matter of Truman v Fischer*, 75 AD3d 1019, 1020; *Matter of Johnson v Goord*, 297 AD2d 881, 883). Petitioner further contends that the Hearing Officer who presided at the hearing on the first MBR was biased. That contention, however, also is not properly before us (*see Matter of Madison v Cunningham*, 67 AD3d 1141, 1142; *Matter of Smith v Fischer*, 64 AD3d 1061, 1062, *lv denied* 13 NY3d 712). In any event, we again conclude that the contention lacks merit. "The record does not support petitioner's contention that the Hearing Officer was biased or that the determination flowed from the alleged bias" (*Matter of Rodriguez v Herbert*, 270 AD2d 889, 890; *see Matter of Colon v Fischer*, 83 AD3d 1500, 1501-1502). Petitioner's final contention with respect to the first MBR is that he was denied his right of confrontation when he was denied access to adverse evidence. Petitioner failed to exhaust his administrative remedies with respect to that contention, and this Court has no discretionary authority to reach that contention (*see Matter of Nelson v Coughlin,* 188 AD2d 1071, 1071, *appeal dismissed* 81 NY2d 834).

While petitioner was confined in the special housing unit (SHU) as a result of the first MBR, he was served with another MBR (second MBR) alleging that he violated rules 113.22 (7 NYCRR 270.2 [B] [14] [xii] [possessing articles in unauthorized areas]) and 106.10 (7 NYCRR 270.2 [B] [7] [i] [refusing to obey orders promptly and without argument]). The second MBR was written on December 21, 2010. Contrary to petitioner's contention, the hearing on the second MBR was timely commenced and completed (*see* 7 NYCRR 251-5.1 [a], [b]). Because "petitioner was already confined to [the SHU] as a result of an unrelated matter when he received the instant misbehavior report[,] . . . the seven-day rule for commencing the hearing was inapplicable" (*Matter of Faison v Senkowski*, 256 AD2d 702, *appeal dismissed* 93 NY2d 870; *see* 7 NYCRR 251-5.1 [a]; *Matter of Applewhite v Goord*, 45 AD3d 1112, *lv denied* 10 NY3d 711; *Matter of Rodriguez v Goord*, 276 AD2d 493). Petitioner also contends that the hearing on the second MBR was untimely under section 251-5.1 (b) because it was not completed within 14 days following the writing of the second MBR. That contention lacks merit. "In calculating the 14-day time period, the date the misbehavior report is written is excluded" (*Matter of Freeman v Selsky*, 270 AD2d 547, 547-548; *see Matter of Harris v Goord*, 268 AD2d 933, 934; *see generally* General Construction Law § 20). Here, the second MBR was written on December 21, 2010, and the hearing was completed on January 4, 2011, which was within the requisite time period.

Petitioner further contends that the Hearing Officer presiding over the hearing on the second MBR was biased as well, but he failed to exhaust his administrative remedies with respect to that contention

(*see Nelson*, 188 AD2d at 1071). With respect to petitioner's contention that he did not receive adequate employee assistance on the second MBR, we conclude that his contention is not properly before us inasmuch as petitioner did not raise that contention in his petition (*see Pigmentel*, 19 AD3d at 817; *Crawford*, 124 AD2d 1018).

Finally, we note that Supreme Court erred in transferring that part of the proceeding related to the SOCTP transfer and medical attention grievances to this Court inasmuch as any determinations with respect to those grievances were " 'not made as a result of a hearing held . . . pursuant to direction by law' " (*Matter of McEachin v Fischer*, 71 AD3d 1558, 1559, *amended on rearg on other grounds* 74 AD3d 1879; *see* CPLR 7803 [4]; *Matter of Shomo v Zon*, 35 AD3d 1227). We nevertheless address the contentions with respect thereto in the interest of judicial economy (*see McEachin*, 71 AD3d at 1559; *Shomo*, 35 AD3d 1227). In his brief to this Court, petitioner does not raise any arguments with respect to his placement in the SOCTP program, and thus his "challenge to [that] determination is deemed abandoned" (*Matter of Lamage v Bezio*, 74 AD3d 1676, 1676; *see Matter of Gathers v Artus*, 59 AD3d 795). In any event, petitioner admits that his grievances related to the SOCTP transfer were summarily rejected by the Grievance Office and that there was no determination thereon, and that the Grievance Office stated that it never received his purported grievance related to the denial of medical care. Thus, petitioner does not dispute that he did not receive a determination on his purported grievances and did not file any administrative appeals related to the purported denial of his grievances. Because petitioner has failed to exhaust administrative remedies with respect to those alleged grievances, we have no discretion to address the merits of his contentions related to them (*see Matter of Fulton v Reynolds*, 83 AD3d 1308, 1308-1309; *Matter of Torres v Fischer*, 73 AD3d 1355, 1356; *Matter of Francis v Hollins*, 255 AD2d 1008, *lv denied* 93 NY2d 801).

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

406

TP 11-01935

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ.

IN THE MATTER OF CARLOS ABREU, PETITIONER,

V ORDER

NURSE K. CHEASMAN, ET AL., RESPONDENTS.

CARLOS ABREU, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (WILLIAM E. STORRS OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Seneca County [Dennis F. Bender, A.J.], entered September 22, 2011) to review a determination of respondents. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996).

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

407

KA 09-00948

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

LAMONTE CAMPBELL, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PHILIP ROTHSCHILD OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (VICTORIA M. WHITE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered October 31, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

408

KA 11-01909

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GARRETT ARCHER, DEFENDANT-APPELLANT.

ANTHONY J. CERVI, BUFFALO, FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered May 26, 2011. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed and the matter is remitted to Supreme Court, Erie County, for proceedings pursuant to CPL 460.50 (5).

Memorandum: Defendant appeals from a judgment that revoked the sentence of probation imposed upon his conviction of attempted rape in the first degree (Penal Law §§ 110.00, 130.35 [1]) and sentenced him to a determinate term of imprisonment. Contrary to defendant's contention, Supreme Court did not err in denying his motion to withdraw his plea upon revoking the original sentence of a period of probation imposed by the court. "While a defendant must be afforded the opportunity to withdraw his or her plea when the plea was induced by a court's sentencing promise *and* the court subsequently finds that sentence to be inappropriate" (*People v Lopez*, 51 AD3d 1210, 1211 [emphasis added]), here the court made no promises regarding defendant's sentence. Thus, the court was not obligated to afford defendant the opportunity to withdraw his plea (*see id.*; *People v Carlton*, 2 AD3d 1353, 1354, *lv denied* 1 NY3d 625; *People v Hannig* [appeal No. 1], 258 AD2d 908).

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

412

KA 06-02304

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY J. JOHNSON, DEFENDANT-APPELLANT.

KRISTIN F. SPLAIN, CONFLICT DEFENDER, ROCHESTER (KIMBERLY J. CZAPRANSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered March 30, 2006. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the third degree (Penal Law § 265.02 [former (4)]). Contrary to defendant's contention, the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant was charged as an accomplice (*see* § 20.00) and, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that the evidence is legally sufficient to establish that defendant jointly possessed his codefendant's loaded firearm (*see People v Velasquez*, 44 AD3d 412, 412, *lv denied* 9 NY3d 1040). According to the evidence presented at trial, just prior to the shooting defendant was driving a moped on which the codefendant was a passenger. Immediately before the codefendant fired a shot or shots toward a vehicle, defendant stopped the moped. It may therefore be inferred that defendant was aware that the codefendant had a loaded firearm, and that he aided the codefendant in that possession inasmuch as he stopped the moped in order for the codefendant to be able to line up his target and fire. In addition, defendant's actions after the shooting further show that he intentionally aided the codefendant in his possession of the loaded firearm. Defendant sped away from the scene of the shooting, swerving past a police vehicle in the process. He ignored the officer's efforts to stop the moped. Indeed, he drove onto the sidewalk, cut through a parking lot, and tried to maneuver around the police

vehicles when the police attempted to block him. We therefore conclude that "defendant's conduct showed that he was aware that his codefendant possessed a handgun" and that he intentionally aided the codefendant in that possession (*People v Santiago*, 199 AD2d 290, 290, *lv denied* 82 NY2d 930; *see People v Carney*, 18 AD3d 242, 243, *lv denied* 5 NY3d 882).

Inasmuch as the evidence at trial is legally sufficient, defendant's challenge to the sufficiency of the evidence before the grand jury is not reviewable on this appeal from the ensuing judgment of conviction (*see People v McCullough*, 83 AD3d 1438, 1439, *lv denied* 17 NY3d 798; *People v Laws*, 41 AD3d 1205, 1206, *lv denied* 9 NY3d 991). Defendant failed to preserve for our review his further contention that his right of confrontation was violated at the predicate felony offender hearing at sentencing (*see People v Dennis*, 91 AD3d 1277, 1278; *People v McMillon*, 77 AD3d 1375, 1375-1376, *lv denied* 16 NY3d 897). In any event, contrary to defendant's contention, the right of confrontation set forth in *Crawford v Washington* (541 US 36) "does not apply at sentencing proceedings" (*People v Leon*, 10 NY3d 122, 126, *cert denied* 554 US 926). Finally, the sentence is not unduly harsh or severe.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

413

KAH 11-01076

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
ANDRIQUE BARON, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND
EKPE D. EKPE, SUPERINTENDENT, WATERTOWN
CORRECTIONAL FACILITY, RESPONDENTS-RESPONDENTS.

KATHLEEN P. REARDON, ROCHESTER, FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ZAINAB A. CHAUDHRY OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), entered October 19, 2010 in a proceeding pursuant to CPLR article 70. The judgment dismissed the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs.

Memorandum: Inasmuch as he has been released to parole supervision, this appeal by petitioner from the judgment dismissing his petition for a writ of habeas corpus has been rendered moot (*see People ex rel. Graham v Fischer*, 70 AD3d 1381, 1381-1382; *People ex rel. Mitchell v Unger*, 63 AD3d 1591; *People ex rel. Hampton v Dennison*, 59 AD3d 951, *lv denied* 12 NY3d 711), and the exception to the mootness doctrine does not apply herein (*see Graham*, 70 AD3d at 1381-1382; *Hampton*, 59 AD3d at 951; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715).

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

417

CA 11-01808

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ.

CHRISTIAN DUQUIN, PLAINTIFF,

V MEMORANDUM AND ORDER

ANDREW CHAMELI, DAWN CHAMELI, JAMES CHAMELI,
DEFENDANTS-RESPONDENTS,
AND WAL-MART STORES, INC., CARE OF CT
CORPORATION SYSTEM, DEFENDANT-APPELLANT.

BROWN & HUTCHINSON, ROCHESTER (R. ANDREW FEINBERG OF COUNSEL), FOR DEFENDANT-APPELLANT.

BROWN & KELLY, LLP, BUFFALO (RENATA KOWALCZUK OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered November 16, 2010. The order, insofar as appealed from, denied in part the motion of defendant Wal-Mart Stores, Inc., Care of CT Corporation System, for summary judgment dismissing the cross claim of defendants Andrew Chameli, Dawn Chameli and James Chameli.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted in its entirety, and the cross claim against defendant Wal-Mart Stores, Inc., Care of CT Corporation System, is dismissed.

Memorandum: By the amended complaint in this case, plaintiff sought damages from defendant Wal-Mart Stores, Inc., Care of CT Corporation System (Wal-Mart), and Andrew Chameli, Dawn Chameli and James Chameli (collectively, Chameli defendants), for injuries that he allegedly sustained when he was struck by a paintball pellet. By a prior order that is not at issue in this appeal, Supreme Court granted Wal-Mart's motion for summary judgment dismissing the amended complaint against it. Wal-Mart now appeals from an order that, inter alia, denied that part of its motion for summary judgment dismissing the cross claim asserted against it by the Chameli defendants insofar as they sought contribution, but granted the motion insofar as they sought indemnification. We agree with Wal-Mart that, under the circumstances presented here, it owed no duty of care to plaintiff, and thus the court should have granted the motion in its entirety.

The Chameli defendants sought contribution from Wal-Mart on the theories that Wal-Mart was negligent per se because it sold a

paintball gun to plaintiff in violation of Penal Law § 265.10 (5), and that Wal-Mart was negligent in the marketing and sale of paintball guns. Neither theory supports a claim for contribution in this case.

Under Penal Law § 265.10 (5), "[a]ny person who disposes of any of the weapons, instruments, appliances or substances specified in section 265.05 [of the Penal Law] to any other person under the age of sixteen years is guilty of a class A misdemeanor," and "[i]t is undisputed that a paintball gun uses 'spring or air' as the propelling force within the meaning of Penal Law § 265.05, which prohibits the unlawful possession of weapons by persons under 16" (*Herdzik v Chojnacki*, 68 AD3d 1639, 1641; *see DiSilvestro v Samler*, 32 AD3d 987, 988-989). Here, however, it is undisputed that plaintiff was not injured by the paintball gun that he purchased from Wal-Mart but, rather, another paintball gun used by one of the Chameli defendants allegedly caused plaintiff's injuries. "In the ordinary circumstance, common law in the State of New York does not impose a duty to control the conduct of third persons to prevent them from causing injury to others; liability for the negligent acts of third persons generally arises when the defendant has authority to control the actions of such third persons" (*Purdy v Public Adm'r of County of Westchester*, 72 NY2d 1, 8, *rearg denied* 72 NY2d 953). By establishing that it did not sell the paintball gun that caused plaintiff's injury and that it had no authority to control the conduct of the Chameli defendants, Wal-Mart met its burden on the motion with respect to Penal Law § 265.05 (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

In addition, by establishing that plaintiff was not injured by a paintball gun that it sold, Wal-Mart met its burden with respect to the Chameli defendants' negligent marketing and sales theory. Furthermore, "plaintiff[] did not present any evidence tending to show to what degree [his] risk of injury was enhanced by the presence of negligently marketed and distributed [paintball] guns, as opposed to the risk presented by all [paintball] guns in society" (*Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 235).

Inasmuch as the Chameli defendants failed to raise a triable issue of fact as to any common-law or statutory authority pursuant to which Wal-Mart had a duty to plaintiff that would render it liable for contribution to the Chameli defendants (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562), the court was required to grant the motion in its entirety and dismiss the cross claim of the Chameli defendants.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

418

CA 11-00780

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ.

IN THE MATTER OF THE APPLICATION OF JACQUELINE FLEMING, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

KIDSPEACE NATIONAL CENTERS, BETY FARKAS, LSMW, PROGRAM MANAGER AND JAIME A. KOSICH, MSEDC, FAMILY RESOURCE SPECIALIST, RESPONDENTS-RESPONDENTS.

FRANK S. FALZONE, BUFFALO, FOR PETITIONER-APPELLANT.

HARRIS BEACH PLLC, BUFFALO (DALE WORRALL OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered May 26, 2010 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination to "terminat[e]" her certification as a foster parent. Petitioner contends that she was denied procedural due process because she was not given notice and opportunity to be heard with respect to the termination. We reject that contention. KidsPeace National Centers (respondent) notified petitioner by letter that it would "close" her certification effective July 10, 2009. Petitioner's current certification to board children expired July 2, 2009 in any event, and thus respondent essentially notified petitioner that it would not renew her certification. "A hearing is required only where a license is to be suspended or revoked and . . . due process does not mandate such a hearing before the denial of a renewal license" (*Matter of M.S.B.A. Corp. v Markowitz*, 23 AD3d 390, 391; *see Matter of Daxor Corp. v State of N.Y. Dept. of Health*, 90 NY2d 89, 98, *rearg denied* 90 NY2d 937, *cert denied* 523 US 1074; *Testwell, Inc. v New York City Dept. of Bldgs.*, 80 AD3d 266, 273-274). Thus, the only rights petitioner had to notice and an opportunity to be heard were pursuant to respondent's own policies and the applicable state regulation, and "[t]he record amply demonstrates that these requirements were satisfied" (*Testwell, Inc.*, 80 AD3d at 274). With respect to the state regulation, petitioner was given timely notice of respondent's decision and the reasons therefor, as

required by 18 NYCRR 443.11 (a), and was afforded the requisite opportunity "to meet with an official of the agency to review the decision and the reasons for the agency decision" (18 NYCRR 443.11 [b]). We have reviewed petitioner's remaining contentions and conclude that they are without merit.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

419

CA 11-01671

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ.

IN THE MATTER OF KEVIN FAGER, THOMAS GILLETT AND OTHER PETITIONERS UNITED IN INTEREST, PETITIONERS-APPELLANTS,

V ORDER

BOARD OF EDUCATION, ROCHESTER CITY SCHOOL DISTRICT, RESPONDENT-RESPONDENT.

RICHARD E. CASAGRANDE, LATHAM (JAMES D. BILIK OF COUNSEL), FOR PETITIONERS-APPELLANTS.

CHARLES G. JOHNSON, ROCHESTER (MICHAEL E. DAVIS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (David Michael Barry, J.), entered November 1, 2010 in a proceeding pursuant to CPLR article 78. The judgment denied and dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

424

CA 11-01513

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ.

INTERNATIONAL ELECTRON DEVICES (USA) LLC,
AND INTERNATIONAL ELECTRON DEVICES, LTD.,
PLAINTIFFS-APPELLANTS,

V ORDER

MENTER, RUDIN & TRIVELPIECE, P.C.,
DEFENDANT-RESPONDENT.

AMY POSNER, NEW YORK CITY, FOR PLAINTIFFS-APPELLANTS.

THORN GERSHON TYMANN & BONANNI, LLP, ALBANY (MATTHEW H. MCNAMARA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered April 20, 2011 in a legal malpractice action. The order and judgment granted defendant's motion for summary judgment.

It is hereby ORDERED that the order and judgment so appealed from is unanimously affirmed without costs.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

425

CA 11-01740

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ.

MARTIN SAMPLE AND MARY ANN SAMPLE,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ELLEN YOKEL, DEFENDANT-RESPONDENT.

KNAUF SHAW LLP, ROCHESTER (ALAN J. KNAUF OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HISCOCK & BARCLAY, LLP, ROCHESTER (GARY H. ABELSON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered April 21, 2011. The order and judgment granted the motion of defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that the order and judgment so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiffs, who purchased a home from defendant, commenced this action seeking compensatory and punitive damages for negligence, the alleged failure to perform the requirements of Real Property Law § 465 (2) in conjunction with the sale of residential real estate (hereafter, property), fraud, restitution and implied indemnification. Plaintiffs appeal from an order and judgment granting defendant's motion for summary judgment dismissing the complaint, and we affirm. We note at the outset that plaintiffs conceded before the motion court that they had no viable cause of action for the alleged failure to perform the requirements of Real Property Law § 465 (2) (*see generally Cacheiro v Middletown Enlarged City School Dist.*, 29 AD3d 846, 846), and they do not address the implied indemnification cause of action on appeal and thus are deemed to have abandoned any issue with respect to it (*see Ciesinski v Town of Aurora,* 202 AD2d 984, 984).

We further note at the outset that we agree with plaintiffs that Supreme Court erred in discrediting the affidavit of their expert. "[O]pinion evidence must be based on facts in the record or personally known to the witness" (*Hambsch v New York City Tr. Auth.*, 63 NY2d 723, 725 [internal quotation marks omitted]) and, although plaintiffs' expert did not personally inspect some of the property defects at issue, his limited familiarity with the property goes "to the weight

of his . . . opinion as evidence, not its admissibility" (*Matter of State of New York v Blair*, 87 AD3d 1327, 1328 [internal quotation marks omitted]). Nevertheless, the error is of no moment inasmuch as the expert addressed the construction of the deck, which was not at issue, and he did not address the relevant issue whether defendant concealed information concerning the condition of the deck.

We conclude that the court properly granted that part of the motion with respect to the cause of action for negligence, in which plaintiffs alleged that defendant was negligent in failing, inter alia, to provide an accurate disclosure of property defects in the Property Condition Disclosure Statement. "It is well settled that '[a] claim for negligent misrepresentation requires the plaintiff[s] to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff[s]; (2) that the information was incorrect; and (3) reasonable reliance on the information' " (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180, quoting *J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148, *rearg denied* 8 NY3d 939). Even assuming, arguendo, that defendant had the requisite relationship with plaintiffs that required her to disclose correct information to plaintiffs concerning the property (*see Meyers v Rosen*, 69 AD3d 1095, 1096), we conclude that defendant met her initial burden on that part of the motion by submitting evidence that the information imparted to plaintiffs was correct and that, in opposition thereto, plaintiffs failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Turning now to the fraud cause of action, it is well settled that, "[t]o establish a cause of action for fraud, plaintiff[s] must demonstrate that defendant[] knowingly misrepresented a material fact upon which plaintiff[s] justifiably relied and which caused plaintiff[s] to sustain damages" (*Klafehn v Morrison*, 75 AD3d 808, 810). "Although New York traditionally adheres to the doctrine of caveat emptor in an arm's length real property transfer . . ., Real Property Law article 14 codifies a seller's disclosure obligations for certain residential real property transfers" (*id.*), including this residential real property transaction (*see* § 461 [5]). False representation in a property condition disclosure statement mandated by Real Property Law § 462 (2) "may constitute active concealment in the context of fraudulent nondisclosure . . ., [but] to maintain such a cause of action, 'the buyer[s] must show, in effect, that the seller thwarted the buyer[s'] efforts to fulfill the buyer[s'] responsibilities fixed by the doctrine of caveat emptor' " (*Klafehn*, 75 AD3d at 810). Here, defendant met her initial burden on that part of the motion with respect to the fraud cause of action by submitting evidence that she did not knowingly fail to disclose any defects in the property, and in opposition plaintiffs failed to raise a material issue of fact (*see generally Zuckerman*, 49 NY2d at 562).

We further conclude that the court properly granted that part of the motion with respect to the restitution cause of action. " '[T]he essential inquiry in any [cause of] action for . . . restitution is whether it is against equity and good conscience to permit the

defendant to retain what is sought to be recovered' " (*Sperry v Crompton Corp.*, 8 NY3d 204, 216, quoting *Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421, *remittitur amended* 31 NY2d 678, *rearg denied* 31 NY2d 709, *cert denied* 414 US 829). Here, defendant met her initial burden by establishing that she was not enriched through negligence or fraud in conjunction with the sale of the property to plaintiffs, and plaintiffs failed to raise a triable issue of fact (*see Zuckerman*, 49 NY2d at 562; *cf. Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 474-475).

Finally, we conclude that the court properly dismissed the claim for punitive damages. "Punitive damages are permitted when the defendant's wrongdoing is not simply intentional but evince[s] a high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations . . . The misconduct must be exceptional, as when the wrongdoer has acted maliciously, wantonly, or with a recklessness that betokens an improper motive or vindictiveness . . . or has engaged in outrageous or oppressive intentional misconduct or with reckless or wanton disregard of safety or rights" (*Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 489 [internal quotation marks omitted]). Here, there was no misconduct on the part of defendant and, even assuming, arguendo, that she engaged in wrongdoing, we conclude that this is not an "exceptional" case in which punitive damages are warranted (*id.*).

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

427

KA 10-00213

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY R. DOMBROWSKI, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALAN WILLIAMS OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Erie County Court (Michael F. Pietruszka, J.), entered December 3, 2009. The appeal was held by this Court by order entered September 30, 2011, decision was reserved and the matter was remitted to Erie County Court for further proceedings (87 AD3d 1267). The proceedings were held and completed.

It is hereby ORDERED that the order so appealed from is unanimously affirmed.

Memorandum: Defendant was convicted following a nonjury trial of, inter alia, burglary in the second degree (Penal Law § 140.25 [2]), and that judgment of conviction was affirmed on appeal (*People v Dombrowski*, 55 AD3d 1358, *lv denied* 11 NY3d 924). Defendant thereafter moved pursuant to CPL 440.10 and 440.20 to vacate the judgment and to set aside the sentence. After that motion was summarily denied, we granted his CPL 460.15 application for a certificate granting leave to appeal. We note at the outset that, on appeal, defendant failed to raise any contention concerning that part of his motion seeking to set aside the sentence, and we thus deemed any issues with respect thereto abandoned (*Dombrowski*, 87 AD3d 1267, 1267). We concluded, however, that defendant was entitled to a hearing on the issue whether defense counsel had a tactical reason for failing to call exculpatory witnesses, two of whom were present in the courthouse during defendant's trial, and we remitted the matter to County Court for a hearing on that issue (*id.* at 1268).

At the hearing upon remittal, trial counsel discussed his reason for not calling those witnesses and, while in hindsight that decision may not have been the best strategy, it is well settled that disagreement over trial strategy is not a basis for a determination of

ineffective assistance of counsel (*see generally People v Benevento*, 91 NY2d 708, 712-713; *People v Baldi*, 54 NY2d 137, 146). We therefore conclude that, upon remittal, defendant failed to meet his burden of demonstrating the absence of a legitimate or strategic basis for trial counsel's decision not to call those witnesses and has thus failed to establish that he was denied effective assistance of counsel (*see e.g. People v Collins*, 85 AD3d 1678, 1679; *People v Gonzalez*, 62 AD3d 1263, 1265, *lv denied* 12 NY3d 925; *People v Roman*, 60 AD3d 1416, 1417-1418, *lv denied* 12 NY3d 928).

As defendant correctly contends, however, the certificate of conviction mistakenly recites that he was sentenced as a second violent felony offender. The sentencing minutes establish that defendant was sentenced as a "second felony offender," and the certificate of conviction must therefore be amended to correct the clerical error (*see generally People v Saxton*, 32 AD3d 1286, 1286-1287).

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

428

TP 11-02331

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, AND MARTOCHE, JJ.

IN THE MATTER OF WILFREDO RAMOS, PETITIONER,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (ADAM W. KOCH OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered November 15, 2011) to review a determination of respondent. The determination found after a Tier II hearing that petitioner had violated an inmate rule.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

430

TP 11-02332

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, AND MARTOCHE, JJ.

IN THE MATTER OF GARNETT LEACOCK, PETITIONER,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (NORMAN P. EFFMAN OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered November 15, 2011) to review a determination of respondent. The determination found after a Tier II hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996).

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

431

TP 11-02330

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, AND MARTOCHE, JJ.

IN THE MATTER OF DEWITT GIBSON, PETITIONER,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (LEAH R. NOWOTARSKI OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered November 15, 2011) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

432

KA 09-01171

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

REGGIE CLARK, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John J. Connell, J.), rendered November 14, 2008. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree (seven counts), criminal possession of stolen property in the fourth degree (two counts), grand larceny in the fourth degree, petit larceny, and criminal possession of stolen property in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

433

KA 11-00997

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NICOLE L. COLUCCI, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (MARY-JEAN BOWMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (LAURA T. BITTNER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered April 14, 2011. The judgment convicted defendant, upon her plea of guilty, of manslaughter in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of manslaughter in the second degree (Penal Law § 125.15 [1]). We reject defendant's contention that her waiver of the right to appeal was invalid (*see generally People v Lopez*, 6 NY3d 248, 256). The plea colloquy and the written waiver of the right to appeal signed by defendant demonstrate that she knowingly, intelligently and voluntarily waived the right to appeal (*see People v James*, 71 AD3d 1465, 1465), and the record establishes that " 'defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Dunham*, 83 AD3d 1423, 1424, *lv denied* 17 NY3d 794, quoting *Lopez*, 6 NY3d at 256).

Defendant's further contention that County Court erred in relying upon improper statements by the prosecutor during sentencing does not survive defendant's valid waiver of the right to appeal "inasmuch as defendant is essentially challenging the procedure pursuant to which [she] was sentenced . . ., rather than the legality of the sentence . . . 'Because the power of the court is not implicated by [that] challenge[ ], appellate review of [that challenge] is foreclosed by the bargained-for waiver of [the right to] appeal' " (*People v Adams*, 64 AD3d 1186, 1187, *lv denied* 13 NY3d 834).

Finally, defendant's challenge to the severity of the sentence is

encompassed by her valid waiver of the right to appeal (*see Lopez*, 6 NY3d at 255-256; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

438

KA 11-01157

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RANDY COLUCCI, SR., DEFENDANT-APPELLANT.

KATHLEEN E. CASEY, BARKER, FOR DEFENDANT-APPELLANT.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered April 14, 2011. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the second degree (Penal Law § 125.15 [1]). We conclude that defendant's contentions regarding his waiver of the right to challenge the judgment of conviction by motion pursuant to CPL articles 330 and 440 or by writ of coram nobis are premature (*see People v Hill*, ___ AD3d ___, ___ [Mar. 16, 2012]). It is settled that the courts of this State may decide only controversies that are presently justiciable. To be justiciable, a controversy must "involve present, rather than hypothetical, contingent or remote, prejudice" to a party (*American Ins. Assn. v Chu*, 64 NY2d 379, 383, *appeal dismissed and cert denied* 474 US 803). Here, defendant's contentions with respect to such postjudgment relief "seek[] merely an advisory opinion" (*Hill*, ___ AD3d at ___).

We reject defendant's further contention that his waiver of the right to appeal was invalid (*see generally People v Lopez*, 6 NY3d 248, 256). Defendant signed a written waiver of the right to appeal, and the plea colloquy demonstrates that he knowingly, intelligently and voluntarily waived the right to appeal (*see People v James*, 71 AD3d 1465, 1465). Further, the record establishes that he " 'understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Dunham*, 83

AD3d 1423, 1424, *lv denied* 17 NY3d 794, quoting *Lopez*, 6 NY3d at 256).

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

441

KA 10-01584

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

STANLEY E. SMITH, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

SCOTT P. FALVEY, CANANDAIGUA, FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA, FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered September 12, 2007. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

442

KA 10-01583

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

STANLEY E. SMITH, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

SCOTT P. FALVEY, CANANDAIGUA, FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA, FOR RESPONDENT.

Appeal from an order of the Ontario County Court (Frederick G. Reed, A.J.), dated September 28, 2007. The order directed defendant to pay restitution.

It is hereby ORDERED that the order so appealed from is unanimously affirmed.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

443

KA 11-01061

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TRACY L. JONES, DEFENDANT-APPELLANT.

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. SMALL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered July 14, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted sexual abuse in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted sexual abuse in the first degree (Penal Law §§ 110.00, 130.65 [1]). We agree with defendant that his waiver of the right to appeal is invalid. Supreme Court's "brief reference to the waiver of the right to appeal during the plea colloquy was insufficient to establish that the waiver was a knowing and voluntary choice" (*People v Littleton*, 62 AD3d 1267, 1268, *lv denied* 12 NY3d 926). Thus, defendant's challenge to the severity of the sentence and his contention regarding ineffective assistance of counsel are not encompassed by his waiver of the right to appeal. Nevertheless, we conclude that the sentence is not unduly harsh or severe. To the extent that defendant's contention that he was denied effective assistance of counsel with respect to sentencing is not forfeited by the plea (*see People v Shubert*, 83 AD3d 1577, 1578), it is lacking in merit (*see generally People v Ford*, 86 NY2d 397, 404).

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

444

CAF 11-01102

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, AND MARTOCHE, JJ.

IN THE MATTER OF ALICE TRIPLETT,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DARRYL SCOTT, RESPONDENT-APPELLANT.

DEBORAH J. SCINTA, ORCHARD PARK, FOR RESPONDENT-APPELLANT.

DENIS A. KITCHEN, JR., WILLIAMSVILLE, FOR PETITIONER-RESPONDENT.

CARLA E. HIGGINS, ATTORNEY FOR THE CHILD, BUFFALO, FOR JIHAD S.

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered March 25, 2011 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted petitioner custody of the subject child.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating those parts stating that the order is entered upon the default of respondent and that respondent failed to appear before Family Court, and as modified the order is affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent father appeals from an order that, inter alia, granted sole custody of the subject child to petitioner mother. Initially, we reject the contention of the mother and the Attorney for the Child that the appeal must be dismissed on the ground that it was entered upon the father's default. Although the order on appeal is denominated an "Order of Custody and Visitation on Default," Family Court repeatedly stated during the proceedings and in its bench decision that the father was not in default. It is settled that, where "an order and decision conflict, the decision controls" (*Matter of Christina M.*, 247 AD2d 867, 867, *lv denied* 91 NY2d 812; *see Matter of Alexis H.*, 90 AD3d 1679, 1679; *Matter of Van Orman v Van Orman*, 19 AD3d 1167, 1168). In any event, "[t]he record establishes that the father was represented by counsel, and we have previously determined that, [w]here a party fails to appear [in court on a scheduled date] but is represented by counsel, the order is not one entered upon the default of the aggrieved party and appeal is not precluded" (*Matter of Balls v Doliver*, 72 AD3d 1618, 1618-1619 [internal quotation marks omitted]; *see Matter of Hopkins v Gelia*, 56 AD3d 1286). Consequently, the order incorrectly reflects that it is entered upon the default of

the father and that the father failed to appear before Family Court to answer the petition inasmuch as his attorney appeared in court to represent him, and we therefore modify the order accordingly.

The father's contention that the court abused its discretion in conducting the hearing in his absence "is without merit. The [father] in fact appeared by counsel and, although [he] had notice of the hearing, [he] chose not to attend" (*Matter of Stiles v Edwards*, 74 AD3d 1869, 1870; *cf. Matter of Kendra M.*, 175 AD2d 657, 658). Contrary to the father's further contention, the court properly awarded sole custody to the mother. The court's determination after a hearing that the best interests of the child are served by awarding sole custody to the mother is entitled to great deference (*see Eschbach v Eschbach*, 56 NY2d 167, 173-174), "particularly in view of the hearing court's superior ability to evaluate the character and credibility of the witnesses" (*Matter of Thillman v Mayer*, 85 AD3d 1624, 1625). Here, the bench decision demonstrates that the court engaged in a "careful weighing of [the] appropriate factors" (*Matter of Pinkerton v Pensyl*, 305 AD2d 1113, 1114), and its determination has a sound and substantial basis in the record (*see Betro v Carbone*, 5 AD3d 1110, 1110; *Matter of Thayer v Ennis*, 292 AD2d 824, 825).

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

449

CA 11-02262

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, AND MARTOCHE, JJ.

COLONIAL SURETY COMPANY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GENESEE VALLEY NURSERIES, INC., ET AL.,
DEFENDANTS,
AND PAUL W. O'BRIEN, DEFENDANT-RESPONDENT.

UNDERBERG & KESSLER LLP, BUFFALO (EDWARD P. YANKELUNAS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

PAUL W. O'BRIEN, DEFENDANT-RESPONDENT PRO SE.

Appeal from an order of the Supreme Court, Allegany County (Thomas P. Brown, A.J.), entered January 26, 2011. The order denied plaintiff's motion to amend a second amended judgment to include additional attorneys' fees, interest and other costs.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating that part denying plaintiff's motion insofar as it sought to amend the second amended judgment to include additional attorneys' fees that plaintiff incurred in attempting to collect upon that judgment and to prevent defendant from fraudulently discharging that judgment in bankruptcy and granting the motion to the extent that it seeks reasonable attorneys' fees and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Allegany County, for further proceedings in accordance with the following Memorandum: Plaintiff commenced this action seeking damages pursuant to an indemnification agreement with, inter alia, defendants. Supreme Court subsequently struck the answer of Paul W. O'Brien (defendant) based on his failure to comply with an order directing him to post a certain amount of money as security for his obligations pursuant to the indemnification agreement, and the court entered judgment against him, followed by an amended judgment and a second amended judgment. We agree with plaintiff that Supreme Court erred in denying those parts of its motion to amend the second amended judgment to include additional attorneys' fees that plaintiff incurred in attempting to collect upon that judgment and to prevent defendant from fraudulently discharging that judgment in bankruptcy. We therefore modify the order accordingly, and we remit the matter to Supreme Court to calculate the amount of reasonable attorneys' fees to be awarded to plaintiff.

Initially, we note that plaintiff has not presented any argument

on appeal concerning that part of its motion seeking to increase the amount of damages awarded in the second amended judgment by adding certain postjudgment interest, and it therefore is deemed to have abandoned that issue (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

"Under the general rule, attorney[s'] fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491). "[A] contract assuming th[e] obligation [to indemnify with respect to attorneys' fees] must be strictly construed to avoid reading into it a duty [that] the parties did not intend to be assumed" (*Tudisco v Duerr* [appeal No. 2], 89 AD3d 1372, 1376 [internal quotation marks omitted]). Furthermore, a party may not recover attorneys' fees arising from litigation with the other party to a contract unless an intent to provide for such reimbursement "is unmistakably clear from the language of the promise" (*Hooper Assoc.*, 74 NY2d at 492; *see Parkway Pediatric & Adolescent Medicine LLC v Vitullo*, 72 AD3d 1513).

Here, the pertinent part of the indemnification agreement provides that defendant "agree[s] to . . . indemnify and save harmless [plaintiff] from . . . any and all . . . loss, costs, damages or expenses of whatever nature or kind, including fees of attorneys and all other expenses, including . . . costs and fees of . . . attempting to recover losses or expenses from [defendants] or third parties . . ." "If [that] broadly phrased agreement to indemnify did not include legal expenses incurred in [attempting to collect upon a judgment] . . ., it is difficult, if not impossible, to ascertain for what it was that [defendant] had agreed to indemnify" plaintiff (*Breed, Abbott & Morgan v Hulko*, 139 AD2d 71, 73, *affd* 74 NY2d 686). We therefore conclude that it "is unmistakably clear from the language of the [indemnification agreement]" that defendant must indemnify plaintiff for the costs of attempting to enforce that agreement (*Hooper Assoc.*, 74 NY2d at 492), including the attorneys' fees for attempting to collect upon the second amended judgment and to prevent defendant from fraudulently discharging that judgment in bankruptcy.

Plaintiff's remaining contention is academic in light of our determination.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

453

CA 11-01205

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, AND MARTOCHE, JJ.

HEATHER L. BERMINGHAM, PLAINTIFF,

V MEMORANDUM AND ORDER

THE PETER, SR. & MARY L. LIBERATORE FAMILY LIMITED PARTNERSHIP, DOING BUSINESS AS LINCOLN SQUARE APARTMENTS, DEFENDANT.

THE PETER, SR. & MARY L. LIBERATORE FAMILY LIMITED PARTNERSHIP, DOING BUSINESS AS LINCOLN SQUARE APARTMENTS, THIRD-PARTY PLAINTIFF-RESPONDENT,

V

GEARY S. KOPP, DOING BUSINESS AS S&K LANDSCAPING, THIRD-PARTY DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (AMANDA L. MACHACEK OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

COHEN & LOMBARDO, P.C., BUFFALO (JAMES J. NASH OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered February 7, 2011. The order, among other things, granted the motion of third-party defendant for leave to renew his cross motion for summary judgment, and upon renewal, adhered to the prior determination denying that cross motion.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting third-party defendant's cross motion in part and dismissing the claim for contribution, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she allegedly slipped and fell on black ice in a parking lot owned by defendant-third-party plaintiff (defendant). Defendant commenced the third-party action, asserting claims for, inter alia, common-law indemnification and contribution. Supreme Court denied defendant's motion seeking a conditional order of common-law indemnification against third-party defendant, its snow removal contractor, and denied third-party defendant's cross motion seeking summary judgment dismissing the third-party complaint. The

third-party action was severed from the main action and, following the trial of the main action, third-party defendant moved for leave to renew his cross motion. Although the court purportedly denied the motion for leave to renew, it is apparent from the decision that the court actually granted the motion and, upon renewal, adhered to its original decision.

We conclude that the court, upon renewal, properly refused to dismiss the common-law indemnification claim. Even assuming, arguendo, that third-party defendant requested such relief in his cross motion and thus that the issue is properly before us (*cf. Oneida Indian Nation v Hunt Constr. Group, Inc.*, 88 AD3d 1264, 1266), we conclude that he failed to meet his initial burden of establishing that plaintiff's accident was not attributable to his negligent performance or nonperformance of an act solely within his province under the contract with defendant (*see Abramowitz v Home Depot USA, Inc.*, 79 AD3d 675, 677; *Trzaska v Allied Frozen Stor., Inc.*, 77 AD3d 1291, 1293). Contrary to third-party defendant's contention, we further conclude that neither the testimony at the trial of the main action nor the jury verdict following that trial establishes that defendant's liability was other than vicarious, i.e., that defendant was actively negligent (*see generally Eastman v Volpi Mfg. USA, Co.*, 229 AD2d 913, 913).

The court erred upon renewal, however, in denying that part of third-party defendant's cross motion seeking summary judgment dismissing the contribution claim. Third-party defendant met his initial burden of establishing that he did not owe a duty to plaintiff or a duty to defendant independent of the contract (*see Siegl v New Plan Excel Realty Trust, Inc.*, 84 AD3d 1702, 1703; *Zemotel v Jeld-Wen, Inc.*, 50 AD3d 1586, 1587). Third-party defendant further established that his contract with defendant was not "a comprehensive and exclusive agreement which entirely displaced [defendant's] duty to maintain the premises in a safe condition" (*Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 214; *see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140-141). Defendant failed to raise a triable issue of fact in opposition to that part of the cross motion (*see Henriquez v Inserra Supermarkets, Inc.*, 89 AD3d 899, 901). We therefore modify the order accordingly.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

455

KA 09-02513

PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JEFFREY HILL, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (KRISTEN MCDERMOTT OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JAMES P. MAXWELL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered November 21, 2008. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

456

KA 10-02294

PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

D'SEAN WOODS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered November 10, 2010. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

459

KA 02-00380

PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN A. NELSON, DEFENDANT-APPELLANT.

PETER J. PULLANO, ROCHESTER (ANDREW D. FISKE OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Elma A. Bellini, J.), rendered February 4, 2002. The judgment convicted defendant, upon a jury verdict, of rape in the first degree, rape in the second degree, incest, sexual abuse in the second degree (two counts) and endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of one count each of rape in the first degree (Penal Law § 130.35 [1]), rape in the second degree (§ 130.30 [1]), incest (former § 255.25) and endangering the welfare of a child (§ 260.10 [1]), and two counts of sexual abuse in the second degree (§ 130.60 [2]). We reject the contention of defendant that he was denied effective assistance of counsel based on defense counsel's failure to retain an expert witness to counter the testimony of the People's expert (*see People v Prince*, 5 AD3d 1098, 1098, *lv denied* 2 NY3d 804), and defendant failed " 'to demonstrate the absence of strategic or other legitimate explanations for' " the remaining instances of alleged ineffectiveness (*People v Benevento*, 91 NY2d 708, 712). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The jury was entitled to credit the victim's account and to reject the alibi testimony presented by defendant (*see People v Brown*, 34 AD3d 1303; *People v Johnson*, 268 AD2d 891, 894, *lv denied* 94 NY2d 921, 923, 924). Defendant failed to preserve for our review his contention that County Court erred in admitting in evidence his statement to the police inasmuch as defendant did not move to suppress that statement (*see People v Delatorres*, 34 AD3d 1343, 1344, *lv denied* 8 NY3d 921),

and he also failed to preserve for our review his contention that he was denied a fair trial by prosecutorial misconduct (*see* CPL 470.05 [2]; *People v Comer*, 91 AD3d 1339, 1339-1340). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Finally, the sentence is not unduly harsh or severe.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

461

KA 10-02425

PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS A. CULVER, JR., DEFENDANT-APPELLANT.

BRIDGET L. FIELD, ROCHESTER, FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered July 6, 2010. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of grand larceny in the fourth degree (Penal Law § 155.30 [1]), defendant contends that he was denied effective assistance of counsel. We reject that contention. Defendant's contention " 'survives his guilty plea only to the extent that defendant contends that his plea was infected by the alleged ineffective assistance' " (*People v Garner*, 86 AD3d 955, 956; *see People v Gleen*, 73 AD3d 1443, 1444, *lv denied* 15 NY3d 773). "In the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of [defense] counsel" (*People v Ford*, 86 NY2d 397, 404), and upon our review of the record we conclude that defendant was afforded such meaningful representation here. " 'To the extent that defendant contends that defense counsel was ineffective because he coerced defendant into pleading guilty, that contention is belied by defendant's statement during the plea colloquy that the plea was not the result of any [force] or coercion' " (*Garner*, 86 AD3d at 956), and by his statement "that he was satisfied with the representation of defense counsel" (*People v Strasser*, 83 AD3d 1411, 1411). Under the circumstances of this case, we reject defendant's contention that defense counsel was ineffective when defense counsel allegedly induced defendant to plead guilty by misinforming him of his sentence exposure (*see generally Ford*, 86 NY2d at 404). Misinformation as to the possible sentence to which a defendant is exposed "is [a] factor which must be considered by the court [in determining whether a plea was

knowing, intelligent and voluntary and thus whether the plea was infected by the misinformation, rendering defense counsel ineffective], but it is not, in and of itself, dispositive" (*People v Garcia*, 92 NY2d 869, 870; *see People v Morrison*, 78 AD3d 1615, 1616, *lv denied* 16 NY3d 834). Indeed, "[w]hether a plea was knowing, intelligent and voluntary is dependent upon a number of factors[,] including the nature and terms of the agreement, the reasonableness of the bargain, and the age and experience of the accused" (*Garcia*, 92 NY2d at 870; *see Morrison*, 78 AD3d at 1616). To the extent that defendant's contention that he was denied effective assistance of counsel is based on matters outside the record, it must be raised by way of a motion pursuant to CPL article 440 (*see People v Johnson*, 81 AD3d 1428, 1428, *lv denied* 16 NY3d 896; *People v Joyner*, 19 AD3d 1129, 1130). Finally, the sentence is not unduly harsh or severe.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

462

KA 09-00546

PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY N. ADAMS, DEFENDANT-APPELLANT.

PATRICIA M. MCGRATH, LOCKPORT, FOR DEFENDANT-APPELLANT.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered June 10, 2008. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree and manslaughter in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [3]) and manslaughter in the first degree (§ 125.20 [1]). We reject defendant's contention that his waiver of the right to appeal was not knowingly, voluntarily, and intelligently entered (*see People v Lopez*, 6 NY3d 248, 256; *People v Hidalgo*, 91 NY2d 733, 735). "The responses of defendant to County Court's questions during the plea colloquy establish that he understood the consequences of waiving the right to appeal and voluntarily waived that right" (*People v Ruffins*, 78 AD3d 1627, 1627-1628; *see People v Dunham*, 83 AD3d 1423, 1424, *lv denied* 17 NY3d 794). Further, the court " 'describ[ed] the nature of the right being waived without lumping that right into the panoply of trial rights automatically forfeited upon pleading guilty' " (*People v Tabb*, 81 AD3d 1322, 1322, *lv denied* 16 NY3d 900, quoting *Lopez*, 6 NY3d at 257). The court also " 'made clear that the waiver of the right to appeal was a condition of [the] plea, not a consequence thereof' " (*People v McCarthy*, 83 AD3d 1533, 1533-1534, *lv denied* 17 NY3d 819).

"The valid waiver of the right to appeal encompasses defendant's contention concerning the denial of his request for youthful offender status" (*People v Elshabazz*, 81 AD3d 1429, 1429, *lv denied* 16 NY3d 858; *see People v Harris*, 77 AD3d 1326, *lv denied* 16 NY3d 743). The waiver, however, "does not encompass his contention with respect to the severity of the sentence . . . because the record establishes that defendant waived his right to appeal before County Court advised him

of the potential periods of imprisonment that could be imposed" (*People v Mingo*, 38 AD3d 1270, 1271). Nonetheless, we conclude that the sentence is not unduly harsh or severe.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

464

KA 10-01872

PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSE LATORRE, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (STEPHEN J. DILORENZO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered September 8, 2010. The judgment convicted defendant, upon a jury verdict, of manslaughter in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him following a jury trial of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that the evidence is legally insufficient to support the conviction and that the verdict is against the weight of the evidence. The issue of legal sufficiency is preserved for our review regarding the evidence of identification because that was the basis of defendant's motion for a trial order of dismissal after the People presented their proof. Defendant failed, however, to preserve for our review his further contention concerning the alleged legal insufficiency of the evidence of intent, inasmuch as defense counsel did not address the issue of intent in his motion for a trial order of dismissal (*see generally People v Gray*, 86 NY2d 10, 19). With respect to the legal sufficiency of the identification evidence, we note that reversal is warranted "where the testimony is incredible and unbelievable, that is, impossible of belief because it is manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Wallace*, 306 AD2d 802, 802-803 [internal quotation marks omitted]). We conclude that the evidence of identification in this case, although largely circumstantial, is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). In addition, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at

495; *People v Flagg*, 59 AD3d 1003, 1004, *lv denied* 12 NY3d 853). We further reject defendant's contention that defense counsel was ineffective for failing to request that Supreme Court charge a lesser included offense (*see People v Calderon*, 66 AD3d 314, 320, *lv denied* 13 NY3d 858). Finally, the sentence is not unduly harsh or severe.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

465

CAF 11-00297

PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, AND MARTOCHE, JJ.

IN THE MATTER OF JOHN B. AND SHAWN B.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, ORDER
PETITIONER-RESPONDENT;

SHAWN B., SR., RESPONDENT-APPELLANT.

EVELYNE A. O'SULLIVAN, EAST AMHERST, FOR RESPONDENT-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, ATTORNEY FOR THE CHILDREN, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR JOHN B. AND SHAWN B.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered February 7, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights and transferred custody and guardianship of the subject children to petitioner.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

466

CAF 11-02558

PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, AND MARTOCHE, JJ.

IN THE MATTER OF BRIAN S. FONTAINE,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MARY K. FONTAINE, RESPONDENT-RESPONDENT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR PETITIONER-APPELLANT.

BRUCE R. BRYAN, SYRACUSE, FOR RESPONDENT-RESPONDENT.

KAREN J. DOCTER, ATTORNEY FOR THE CHILDREN, FAYETTEVILLE, FOR GABRIELA F. AND ANNA F.

Appeal from an order of the Family Court, Onondaga County (Gina M. Glover, R.), entered March 28, 2011 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted supervised visitation to petitioner.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Onondaga County, for further proceedings in accordance with the following Memorandum: On appeal from an order directing, inter alia, that petitioner father's visitation with the parties' children shall continue to be supervised, the father contends that the Court Attorney Referee erred "in failing to set forth those facts essential to [her] decision" (*Matter of Bradbury v Monaghan*, 77 AD3d 1424, 1424 [internal quotation marks omitted]). We agree. We note at the outset that, according to the order of the Court Attorney Referee, the parties stipulated that the Court Attorney Referee (hereafter, court) would hear and determine the petition. "Effective appellate review . . . requires[, however], that appropriate factual findings be made by the [hearing] court—the court best able to measure the credibility of the witnesses" (*Matter of Jose L. I.*, 6 NY2d 1024, 1026). "Inasmuch as 'the record is not sufficient to enable this Court to make the requisite findings of fact,' " we reverse the order and remit the matter to Family Court for a new hearing on the petition (*Bradbury*, 77 AD3d at 1425), including a new in camera hearing with the children (*see Matter of Lincoln v Lincoln*, 24 NY2d 270).

In light of our determination, we must address only one of the father's remaining contentions, i.e., that the court improperly allowed the Attorney for the Children to approve visitation

supervisors. We reject that contention (*see Matter of Kruty v Manell*, 248 AD2d 809, 811; *see also Matter of Vieira v Huff*, 83 AD3d 1520, 1521). In doing so, we note that the court did not improperly delegate the determination of an issue involving the best interests of the children, "i.e., whether [unsupervised] visitation should resume and, if so, when" (*Matter of Hameed v Alatawaneh*, 19 AD3d 1135, 1136; *cf. Matter of Battista v Battista*, 294 AD2d 941; *Wills v Wills*, 283 AD2d 1023, 1024).

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

472

CA 11-01838

PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, AND MARTOCHE, JJ.

KEVIN J. VIVYAN AND TERRI L. VIVYAN,
PLAINTIFFS-APPELLANTS,

V ORDER

ILION CENTRAL SCHOOL DISTRICT, BOARD OF
EDUCATION OF ILION CENTRAL SCHOOL DISTRICT AND
ILION MEMORIAL POST #920, AMERICAN LEGION, INC.,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

DOUGLAS G. ROBERTS, SYRACUSE, FOR PLAINTIFFS-APPELLANTS.

ROEMER WALLENS GOLD & MINEAUX, LLP, ALBANY (MATTHEW J. KELLY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Herkimer County (Michael E. Daley, J.), entered April 29, 2011 in a personal injury action. The order, among other things, denied the motion of plaintiffs to set aside the verdict or for a new trial.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435; *see also* CPLR 5501 [a] [1], [2]).

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

473

CA 11-01839

PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, AND MARTOCHE, JJ.

KEVIN J. VIVYAN AND TERRI L. VIVYAN,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ILION CENTRAL SCHOOL DISTRICT, BOARD OF
EDUCATION OF ILION CENTRAL SCHOOL DISTRICT AND
ILION MEMORIAL POST #920, AMERICAN LEGION, INC.,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

DOUGLAS G. ROBERTS, SYRACUSE, FOR PLAINTIFFS-APPELLANTS.

ROEMER WALLENS GOLD & MINEAUX, LLP, ALBANY (MATTHEW J. KELLY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Herkimer County (Michael E. Daley, J.), entered April 29, 2011 in a personal injury action. The judgment granted judgment to defendants upon a verdict of no cause of action.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Kevin J. Vivyan (plaintiff) when he was hit in the head by a ball while watching a baseball game. The game was organized by defendant Ilion Memorial Post #920, American Legion, Inc., and was played at Diss Field, which was owned and operated by defendants Ilion Central School District and the Board of Education of Ilion Central School District. Plaintiff was seated in an unscreened bleacher located behind the first baseline. Although there was a grassy area behind the backstop at home plate, there were no bleachers or other seats there.

Following discovery, Supreme Court granted defendants' motion for summary judgment dismissing the complaint. We reversed, holding that, because " 'there was no seating where there was screening and no screening where there was seating[,] . . . a jury question [was] presented regarding the alleged negligence of defendant[s] in failing to exercise reasonable and ordinary care to protect spectators from foreseeable dangers' " (*Vivyan v Ilion Cent. School Dist.*, 66 AD3d 1389, 1390, quoting *Zambito v Village of Albion*, 100 AD2d 739). Following the subsequent trial, a jury determined that defendants were

not negligent. The court thereafter denied plaintiffs' motion to set aside the verdict, and this appeal ensued.

Plaintiffs contend that the court erred in failing to instruct the jury "as to the decisional law that was applicable to this ball field liability case." We reject that contention and conclude that the court's instructions, "as a whole, adequately conveyed the sum and substance of the applicable law" (*Turner v CSX Transp., Inc.* [appeal No. 5], 72 AD3d 1597, 1598 [internal quotation marks omitted]; *see Delong v County of Chautauqua* [appeal No. 2], 71 AD3d 1580, 1581; *Garris v K-Mart, Inc.*, 37 AD3d 1065, 1066).

Contrary to plaintiffs' additional contention, the court did not abuse or improvidently exercise its discretion by admitting in evidence photographs establishing that there was room behind the screened area for plaintiffs to stand or to set up their own lawn chairs (*see Kartychak v Consolidated Edison of N.Y.*, 304 AD2d 487; *see e.g. Anand v Kapoor*, 61 AD3d 787, 788-789, *affd* 15 NY3d 946; *Moore v Suburban Fuel Oil Serv.*, 22 AD2d 827, 828, *affd* 16 NY2d 647; *cf. Torres v City of Geneva*, 33 AD2d 880). "Demonstrative evidence [such as a photograph] is not per se prejudicial and the determination as to its appropriateness lies in the sound discretion of the trial court" (*Rojas v City of New York*, 208 AD2d 416, 417, *lv denied* 86 NY2d 705).

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

474

CA 11-02307

PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, AND MARTOCHE, JJ.

HOWARD L. GROBE, JR., PLAINTIFF-RESPONDENT,

V ORDER

MICHELLE L. MCANDREW, KAREN L. MCANDREW,
DEFENDANTS-APPELLANTS,
FERGUSON ELECTRIC CONSTRUCTION COMPANY, INC.,
ET AL., DEFENDANTS.

THOMAS P. DURKIN, ROCHESTER (JOHN TROP OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

NICHOLAS, PEROT, SMITH, BERNHARDT & ZOSH, P.C., AKRON (ERIC FRIEDHABER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered August 1, 2011 in a personal injury action. The order denied the motion of defendants Michelle L. McAndrew and Karen L. McAndrew to dismiss plaintiff's complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

475

CA 11-02186

PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, AND MARTOCHE, JJ.

ANGEL CORP, AS PARENT AND NATURAL GUARDIAN OF TOMIANNE CORP, AN INFANT, PLAINTIFF-RESPONDENT,

V ORDER

MATTHEW R. RATAJCZAK, DEFENDANT-APPELLANT, MICHAEL MUSCATO, TANYA MUSCATO, JOSEPH G. MUSCATO AND PATRICIA L. MUSCATO, DEFENDANTS-RESPONDENTS.

BOUVIER PARTNERSHIP, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICES OF LAURIE G. OGDEN, BUFFALO (TARA E. WATERMAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOHN A. COLLINS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered February 9, 2011 in a personal injury action. The order denied the motion of defendant Matthew R. Ratajczak for summary judgment dismissing plaintiff's complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

478

KA 10-02156

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM BROCKINGTON, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES ECKERT OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Monroe County Court (Frank P. Geraci, Jr., J.), entered September 21, 2010. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Defendant failed to preserve for our review his contention that he was entitled to a downward departure from his presumptive risk level (*see People v Ratcliff*, 53 AD3d 1110, *lv denied* 11 NY3d 708). "In any event, that contention lacks merit inasmuch as defendant failed to present clear and convincing evidence of special circumstances justifying a downward departure" (*People v Regan*, 46 AD3d 1434, 1435; *see Ratcliff*, 53 AD3d 1110).

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

479

KA 09-00296

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

VERNON HAUSWIRTH, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PIOTR BANASIAK OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JAMES P. MAXWELL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered December 5, 2008. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

480

KA 10-01881

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JERRELL ALLEN, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PHILIP ROTHSCHILD OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JAMES P. MAXWELL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered January 7, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

482

KA 08-02524

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC MCMULLEN, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PHILIP ROTHSCHILD OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JAMES P. MAXWELL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered November 13, 2008. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [3]). The record of the plea colloquy establishes that defendant knowingly, voluntarily and intelligently waived his right to appeal (*see People v Lopez*, 6 NY3d 248, 256; *People v Eatmon*, 66 AD3d 1453, 1453). That valid waiver of the right to appeal encompasses defendant's contention that imposition of the maximum period of postrelease supervision rendered the sentence unduly harsh and severe (*see People v Hidalgo*, 91 NY2d 733, 737; *People v Wilson*, 53 AD3d 928, 929, *lv denied* 11 NY3d 858). Defendant's further contention that County Court erred in failing to apprehend the extent of its discretion in imposing a period of postrelease supervision survives the waiver of the right to appeal (*see People v Montgomery*, 63 AD3d 1635, 1636, *lv denied* 13 NY3d 798; *People v Burgess*, 23 AD3d 1095, *lv denied* 6 NY3d 810). We conclude, however, that "[t]he court's statement at the plea proceeding with respect to the imposition of a five-year period of postrelease supervision does not, without more, indicate that the court erroneously believed that it lacked discretion to impose a shorter period" (*People v Porter*, 9 AD3d 887, *lv denied* 3 NY3d 710).

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

483

KA 11-00994

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL J. FISHER, DEFENDANT-APPELLANT.

KATHLEEN E. CASEY, BARKER, FOR DEFENDANT-APPELLANT.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered May 2, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted robbery in the second degree (Penal Law §§ 110.00, 160.10 [1]). We reject defendant's contention that his waiver of the right to appeal is invalid. "No particular litany is required for an effective waiver of the right to appeal" (*People v McDonald*, 270 AD2d 955, *lv denied* 95 NY2d 800; *see People v Moissett*, 76 NY2d 909, 910-911). The record establishes that defendant's waiver of the right to appeal was knowing, voluntary and intelligent and that it was "intended comprehensively to cover all aspects of the case" (*People v Muniz*, 91 NY2d 570, 575). "Insofar as defendant contends that the waiver of the right to appeal should not encompass any issues raised in a CPL article 330 or article 440 motion or in an application for coram nobis relief . . ., that contention is premature because it seeks merely an advisory opinion" (*People v Hill*, ___ AD3d ___, ___ [Mar. 16, 2012]). Defendant's further contention that he received ineffective assistance of counsel does not survive the guilty plea or the waiver of the right to appeal inasmuch as "defendant failed to demonstrate that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [defense counsel's] allegedly poor performance" (*People v Gleen*, 73 AD3d 1443, 1444, *lv denied* 15 NY3d 773 [internal quotation marks omitted]).

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

488

KA 10-00830

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

YOKOHIRO VIDAL ORTIZ, ALSO KNOWN AS ORTIZ,
DEFENDANT-APPELLANT.

JOHN E. TYO, SHORTSVILLE, FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (HEATHER A. PARKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered September 8, 2009. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment revoking the sentence of probation previously imposed upon his conviction of assault in the second degree (Penal Law § 120.05 [6]) and criminal mischief in the third degree (§ 145.05 [2]) and sentencing him to concurrent terms of imprisonment. Contrary to defendant's contention, County Court properly determined that the People met their burden of establishing by a preponderance of the evidence that defendant violated the terms and conditions of his probation (*see People v Pringle*, 72 AD3d 1629, 1629, *lv denied* 15 NY3d 855; *People v Donohue*, 64 AD3d 1187, 1188; *People v Bergman*, 56 AD3d 1225, *lv denied* 12 NY3d 756). The People provided the necessary "residuum of competent legal evidence" (*Pringle*, 72 AD3d at 1630 [internal quotation marks omitted]), and "the decision to revoke his probation will not be disturbed, [absent a] clear abuse of discretion" (*Bergman*, 56 AD3d 1225 [internal quotation marks omitted]).

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

492

CAF 11-00770

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

IN THE MATTER OF URSULA M. MARQUARDT,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

PAUL D. MARQUARDT, RESPONDENT-APPELLANT.

BRIAN P. DEGNAN, BATAVIA, FOR RESPONDENT-APPELLANT.

CHARLES J. GREENBERG, BUFFALO, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered March 14, 2011 in a proceeding pursuant to Family Court Act article 8. The order, inter alia, found that respondent had committed acts constituting the family offense of disorderly conduct.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 8, respondent appeals from an order that, inter alia, determined that he committed the family offense of disorderly conduct (Penal Law § 240.20) against petitioner on two occasions. At the beginning of the fact-finding hearing, respondent requested that Family Court limit the proof to events occurring within two years prior to the filing of the petition. Both instances of disorderly conduct fall within that time period. Respondent therefore waived his contention that he was denied due process based on the court's consideration of alleged instances of disorderly conduct that occurred during that time period and his further contention that the proceeding is barred by laches or the statute of limitations (*see generally Lahren v Boehmer Transp. Corp.*, 49 AD3d 1186, 1187; *Cervilli v Kezis*, 306 AD2d 430).

Contrary to respondent's contention, we conclude that petitioner established by a preponderance of the evidence that respondent engaged in acts constituting disorderly conduct (*see Matter of Hagopian v Hagopian*, 66 AD3d 1021, 1022). The court's "assessment of the credibility of the witnesses is entitled to great weight, and the court was entitled to credit the testimony of [petitioner] over that of [respondent]" (*Matter of Scroger v Scroger*, 68 AD3d 1777, 1778, *lv*

denied 14 NY3d 705).

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

493

CAF 11-00798

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

IN THE MATTER OF UCHENNA R. BARLOW,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DONALD C. SMITH, RESPONDENT-RESPONDENT.

TIMOTHY R. LOVALLO, BUFFALO, FOR PETITIONER-APPELLANT.

EVELYNE A. O'SULLIVAN, EAST AMHERST, FOR RESPONDENT-RESPONDENT.

NOEMI FERNANDEZ-HILTZ, ATTORNEY FOR THE CHILDREN, BUFFALO, FOR AALIYAH A.S. AND BRIANTE S.

Appeal from an order of the Family Court, Erie County (E. Jeannette Ogden, A.J.), entered March 25, 2011 in a proceeding pursuant to Family Court Act article 6. The order denied the amended petition.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Petitioner mother appeals from an order that denied her amended petition seeking to modify a prior order of custody and visitation by granting permission for the parties' children to relocate with her to Detroit, Michigan. We affirm. "In seeking such permission, the mother was required to establish by a preponderance of the evidence that the proposed relocation would be in the [children's] best interests" (*Matter of Webb v Aaron*, 79 AD3d 1761; *see Matter of Tropea v Tropea*, 87 NY2d 727, 741), and the mother failed to meet that burden. Contrary to the mother's contention, Family Court "properly considered the relevant factors set forth in *Tropea*" (*Matter of Murphy v Peace*, 72 AD3d 1626, 1626). In considering those factors, "the court properly determined that the mother failed to establish that her [children's lives] and her own life would 'be enhanced economically, emotionally and educationally by the [relocation]' " (*Webb*, 79 AD3d at 1761, quoting *Tropea*, 87 NY2d at 741; *see Murphy*, 72 AD3d at 1626-1627; *Matter of Jones v Tarnawa*, 26 AD3d 870, 871, *lv denied* 6 NY3d 714). The court also "properly determined that the children's relationship with respondent [father] would be adversely affected by the proposed relocation because of the distance between [Erie] County and [Detroit]" (*Jones*, 26 AD3d at 871; *see Matter of Ramirez v Velazquez*, 91 AD3d 1346, 1347; *Webb*, 79 AD3d at 1761-1762), and "the mother failed to establish that there was a visitation arrangement

that would be conducive to the maintenance of a close relationship between the [children] and the father" (*Webb*, 79 AD3d at 1762; *see Matter of Wood v Hargrave*, 292 AD2d 795, 796, *lv denied* 98 NY2d 608; *cf. Matter of Parish A. v Jamie T.*, 49 AD3d 1322, 1323-1324; *see generally Tropea*, 87 NY2d at 738). Finally, the court identified the existence of an additional relevant factor in this case that weighs against the proposed relocation, i.e., the absence of evidence to suggest that the mother made any attempt to secure mental health services in Detroit (*see generally Tropea*, 87 NY2d at 740).

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

498

CA 11-02477

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

PETER MALAMAS AND JODIE MALAMAS,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

TOYS "R" US-DELAWARE, INC.,
DEFENDANT-APPELLANT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (ARTHUR A. HERDZIK OF COUNSEL), FOR DEFENDANT-APPELLANT.

MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (THERESA E. QUINN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Catherine R. Nugent Panepinto, J.), entered November 1, 2011 in a personal injury action. The order denied the motion of defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed with costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Peter Malamas (plaintiff) when he was struck in the back of the head by a box containing a swing set at defendant's store. We conclude that Supreme Court properly denied defendant's motion for summary judgment dismissing the complaint. "It is well established . . . that [a] moving party must affirmatively [demonstrate] the merits of its cause of action or defense and does not meet its burden by noting gaps in its opponent's proof" (*Atkins v United Ref. Holdings, Inc.*, 71 AD3d 1459, 1459-1460 [internal quotation marks omitted]; *see DiBartolomeo v St. Peter's Hosp. of the City of Albany*, 73 AD3d 1326, 1327). We conclude that " '[d]efendant failed to meet its initial burden of establishing as a matter of law that . . . its alleged negligence was not a proximate cause of plaintiff's injuries' " (*Atkins*, 71 AD3d at 1460; *see Kanney v Goodyear Tire & Rubber Co.*, 245 AD2d 1034, 1036). Inasmuch as defendant failed to meet its initial burden on the motion, the burden never shifted to plaintiffs to raise a triable issue of fact (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

503

KA 11-00697

PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

PHILLIP E. KROFT, JR., ALSO KNOWN AS PHILLIP E. KROFT, DEFENDANT-APPELLANT.

BRIDGET L. FIELD, ROCHESTER, FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered February 23, 2011. The judgment convicted defendant, upon his plea of guilty, of rape in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

504

KA 10-01242

PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

EXCELL J. MARKS, DEFENDANT-APPELLANT.

STEVEN D. SESSLER, GENESEO, FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (KATHERINE BOGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered May 17, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

510

KA 09-01639

PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES HAWKINS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CHRISTINE M. COOK OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JAMES P. MAXWELL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered October 28, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [3]). We agree with defendant that his "waiver of his right to appeal was invalid because [County Court] conflated the appeal waiver with the rights automatically waived by the guilty plea" (*People v Martin*, 88 AD3d 473, 474; *see People v Tate*, 83 AD3d 1467, 1467; *People v Daniels*, 68 AD3d 1711, 1712, *lv denied* 14 NY3d 887; *see generally People v Moyette*, 7 NY3d 892, 892-893). Thus, contrary to the People's contentions, defendant's remaining challenges are not encompassed by that waiver.

Defendant contends that, because he did not personally recite the elements of the offense to which he pleaded guilty and gave monosyllabic responses to the court's questions during the plea allocution, the plea colloquy does not sufficiently establish that he understood the nature of the offense to which he was pleading guilty and thus casts doubt upon the voluntariness of his plea. Those contentions are actually addressed to the factual sufficiency of the plea allocution, and defendant failed to preserve them for our review by moving to withdraw the plea or to vacate the judgment of conviction (*see People v Lopez*, 71 NY2d 662, 665; *People v Jamison*, 71 AD3d 1435, 1436, *lv denied* 14 NY3d 888; *People v Bailey*, 49 AD3d 1258, 1259, *lv denied* 10 NY3d 932). This case does not fall within the narrow exception to the preservation requirement set forth in *Lopez* (71 NY2d

at 666). In addition, "[d]efendant failed to preserve for our review his further contention concerning the failure to comply with the procedural requirements set forth in CPL 400.21" (*People v Thompson*, 83 AD3d 1535, 1536; *see People v Pellegrino*, 60 NY2d 636, 637; *People v Dorrah*, 50 AD3d 1619, *lv denied* 11 NY3d 736). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to defendant's further contention, "there is no evidence in the record indicating an abuse of discretion by the court in denying the motion for substitution of counsel [where, as here, the] defendant failed to proffer specific allegations of a 'seemingly serious request' that would require the court to engage in a minimal inquiry" (*People v Porto*, 16 NY3d 93, 100-101; *see People v Beriguette*, 84 NY2d 978, 980, *rearg denied* 85 NY2d 924; *People v Sides*, 75 NY2d 822, 824). With respect to defendant's contention that he received ineffective assistance of counsel, it is well settled that, "[i]n the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404). Here, "[t]o the extent that the contention of defendant survives his plea[] of guilty" (*People v McCoy*, 21 AD3d 1275, 1276, *lv denied* 6 NY3d 756; *see People v Burke*, 256 AD2d 1244, *lv denied* 93 NY2d 851), we conclude that defendant was afforded meaningful representation (*see generally Ford*, 86 NY2d at 404). Finally, the sentence is not unduly harsh or severe.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

511

KA 10-00201

PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

IVAN LUCAS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (JOHN P. GERKEN, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Shirley Troutman, J.), rendered January 26, 2010. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1] [intentional murder]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). Contrary to defendant's contention, the conviction is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Addressing first the conviction of intentional murder, we note that " '[i]ntent to kill may be inferred from defendant's conduct as well as the circumstances surrounding the crime' " (*People v Badger*, 90 AD3d 1531, 1532; *see People v Geddes*, 49 AD3d 1255, 1256, *lv denied* 10 NY3d 863). Here, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that it is legally sufficient to establish defendant's intent to kill. The People presented evidence that defendant had quarreled with the victim immediately before the shooting (*see People v Henning*, 267 AD2d 1092, 1092, *lv denied* 94 NY2d 903). In addition, the shooting occurred while defendant was facing the victim and, with the encouragement of a bystander, defendant pointed a gun toward the victim from a few feet away and fired that weapon (*see People v Cobb*, 72 AD3d 1565, 1565, *lv denied* 15 NY3d 803; *People v Colon*, 275 AD2d 797, 797, *lv denied* 95 NY2d 904). With respect to the conviction of criminal possession of a weapon, "[t]he evidence, viewed in the light most favorable to the People . . ., is legally sufficient to disprove defendant's defense of temporary and lawful possession of a weapon" (*People v Miller*, 259

AD2d 1037, *lv denied* 93 NY2d 927; *see generally Bleakley*, 69 NY2d at 495).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (*see Bleakley*, 69 NY2d at 495). "[R]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury" (*People v Witherspoon*, 66 AD3d 1456, 1457, *lv denied* 13 NY3d 942 [internal quotation marks omitted]). Finally, the sentence is not unduly harsh or severe.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

514

KAH 11-00152

PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
JAMES PEARCE, PETITIONER-APPELLANT,

V ORDER

ROBERT A. KIRKPATRICK, SUPERINTENDENT, WENDE
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

THOMAS E. ANDRUSCHAT, EAST AURORA, FOR PETITIONER-APPELLANT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Penny M. Wolfgang, J.), entered November 30, 2010 in a proceeding pursuant to CPLR article 70. The judgment granted the motion of petitioner for leave to reargue, and upon reargument, adhered to the prior determination denying the petition for a writ of habeas corpus.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

515

KAH 11-02376

PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
JAMES PEARCE, PETITIONER-APPELLANT,

V ORDER

ROBERT A. KIRKPATRICK, SUPERINTENDENT, WENDE
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

THOMAS E. ANDRUSCHAT, EAST AURORA, FOR PETITIONER-APPELLANT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Penny M. Wolfgang, J.), dated October 18, 2010 in a proceeding pursuant to CPLR article 70. The judgment, insofar as appealed from, denied the petition for a writ of habeas corpus.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985).

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

516

TP 11-02146

PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND SCONIERS, JJ.

IN THE MATTER OF CITY OF NIAGARA FALLS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS, ON THE
COMPLAINT OF KEVAN H. ARYA, RESPONDENT-PETITIONER,
AND KEVAN H. ARYA, RESPONDENT.

CRAIG H. JOHNSON, CORPORATION COUNSEL, NIAGARA FALLS (CHRISTOPHER M. MAZUR OF COUNSEL), FOR PETITIONER-RESPONDENT.

CAROLINE J. DOWNEY, BRONX (TONI ANN HOLLIFIELD OF COUNSEL), FOR RESPONDENT-PETITIONER.

Proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Niagara County [Ralph A. Boniello, III, J.], entered April 11, 2011) to review a determination of respondent-petitioner New York State Division of Human Rights. The determination found that petitioner-respondent had discriminated against respondent Kevan H. Arya on the basis of his national origin.

It is hereby ORDERED that the determination so appealed from is unanimously modified on the law and the petition is granted in part by reducing the award of compensatory damages for mental anguish and humiliation to $4,000 and as modified the determination is confirmed without costs and the cross petition is granted to that extent.

Memorandum: Petitioner-respondent (petitioner) commenced this proceeding pursuant to Executive Law § 298 seeking to annul the determination of the Commissioner of respondent-petitioner New York State Division of Human Rights (SDHR), finding that respondent Kevan H. Arya (complainant) was discriminated against based on his national origin. The Commissioner ordered petitioner to pay complainant the sum of $125, for costs incurred by complainant due to the improper refusal by petitioner to permit him to take petitioner’s master electrician’s test, with interest from a specified date to the date on which such payment is made, plus the sum of $8,000 for compensatory damages for mental anguish and humiliation, with interest on that part of the award from the date of the Commissioner’s determination to the date on which such payment is made. Petitioner then commenced this proceeding, and SDHR filed a cross petition seeking enforcement of the Commissioner’s determination.

We conclude that the determination that complainant was discriminated against based on his national origin is supported by substantial evidence in the record. "Judicial review of [S]DHR's determination made after a hearing is limited to consideration of whether substantial evidence supports the agency determination. Substantial evidence 'means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact' " (*Rainer N. Mittl, Ophthalmologist, P.C. v New York State Div. of Human Rights*, 100 NY2d 326, 331, quoting *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180). Furthermore, this Court "may not weigh the evidence or reject the Commissioner's determination 'where the evidence is conflicting and room for choice exists' " (*Matter of Manhattan & Bronx Surface Tr. Operating Auth. v New York State Exec. Dept.*, 220 AD2d 668, 668; *see Matter of New York State Tug Hill Commn. v New York State Div. of Human Rights*, 52 AD3d 1169, 1170). Here, there is evidence supporting that part of the determination of the Commissioner that petitioner's employee failed to respond in a timely manner to a request made by complainant for an application to take the master electrician's test, and indeed did not respond for a two-month period lasting until after the yearly deadline for that test had passed, and there is evidence supporting that part of the determination that such failure was based upon a discriminatory motive. We thus confirm those parts of the determination.

Nevertheless, we agree with petitioner that the award of compensatory damages for mental anguish and humiliation in the amount of $8,000 "is not supported by the evidence. In reviewing such an award, we must 'determine[, inter alia,] whether . . . the award was supported by evidence before [SDHR], and how it compared with other awards for similar injuries' " (*Matter of Anagnostakos v New York State Div. of Human Rights*, 46 AD3d 992, 994, quoting *Matter of New York City Tr. Auth. v State Div. of Human Rights*, 78 NY2d 207, 219). Here, the Commissioner's conclusion that complainant experienced mental anguish and humiliation is based upon the finding of the Administrative Law Judge that complainant "appeared frustrated and angry at the March 2009 public hearing, 6 months after [petitioner]'s September 2008 denial" of his application to take the master electrician's test. Absent any further evidence of mental anguish and humiliation, and absent testimony or evidence concerning the depth thereof experienced by complainant, we conclude that the maximum amount that may be awarded for mental anguish and humiliation is $4,000. We therefore modify the determination accordingly, thus granting the petition in part and granting the cross petition except insofar as the determination is modified with respect to such damages.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

517

CA 11-00864

PRESENT: SCUDDER, P.J., SMITH, FAHEY, CARNI, AND SCONIERS, JJ.

ILLINOIS UNION INSURANCE COMPANY, PLAINTIFF,

V ORDER

ARRIC CORPORATION, ET AL., DEFENDANTS.

ARRIC CORPORATION, THIRD-PARTY PLAINTIFF,

V

FIREMAN'S FUND INSURANCE COMPANY, NATIONAL SURETY CORPORATION, THIRD-PARTY DEFENDANTS-APPELLANTS,
GUARD CONTRACTING CORPORATION, THIRD-PARTY DEFENDANT-RESPONDENT,
ET AL., THIRD-PARTY DEFENDANTS.

LAWRENCE, WORDEN, RAINIS & BARD, P.C., MELVILLE (ROGER B. LAWRENCE OF COUNSEL), FOR THIRD-PARTY DEFENDANTS-APPELLANTS.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (VICTOR ALAN OLIVERI OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered July 30, 2010. The order denied the motion of third-party defendants Fireman's Fund Insurance Company and National Surety Corporation for summary judgment and granted the cross motion of third-party defendant Guard Contracting Corporation for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on January 31, 2012 and filed on February 14, 2012,

It is hereby ORDERED that said appeal is unanimously dismissed without costs upon stipulation.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

518

CA 11-01622

PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND SCONIERS, JJ.

RONALD J. SCOTT AND SANDRA M. SCOTT,
PLAINTIFFS-APPELLANTS,

V ORDER

DANIEL MURCH AND DIIONE K. FOX-MURCH,
DEFENDANTS-RESPONDENTS.

DAMON MOREY LLP, BUFFALO (KARA M. ADDELMAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, ROCHESTER (ALISON M.K. LEE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Yates County (W. Patrick Falvey, A.J.), entered May 4, 2011 in a personal injury action. The order, among other things, granted the motion of defendants for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

520

CA 11-02066

PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND SCONIERS, JJ.

JEAN I. KNAPP, PLAINTIFF-RESPONDENT-APPELLANT,

V ORDER

RICHARD H. NICHOLS, INDIVIDUALLY AND RICHARD H. NICHOLS, DOING BUSINESS AS NICHOLS FINANCIAL SERVICES, DEFENDANT-APPELLANT-RESPONDENT.
(ACTION NO. 1.)

CAROL A. TONZI, PLAINTIFF-RESPONDENT-APPELLANT,

V

RICHARD H. NICHOLS, INDIVIDUALLY AND RICHARD H. NICHOLS, DOING BUSINESS AS NICHOLS FINANCIAL SERVICES, DEFENDANT-APPELLANT-RESPONDENT.
(ACTION NO. 2.)

UNDERBERG & KESSLER, LLP, ROCHESTER (COLIN D. RAMSEY OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

FOLEY AND FOLEY, PALMYRA (JAMES F. FOLEY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeals from an order of the Supreme Court, Wayne County (Thomas M. Van Strydonck, J.), entered August 16, 2011. The order granted the motion of defendant for consolidation and denied as untimely the motion of defendant to dismiss the fourth cause of action in action No. 1.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on January 24 and 30, 2012,

It is hereby ORDERED that said cross appeals are unanimously dismissed upon stipulation, and the order is affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

521

CA 11-01304

PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND SCONIERS, JJ.

IN THE MATTER OF THE APPLICATION OF RODNEY J. MCKEOWN, HOLDER OF FIFTY PERCENT OF ALL OUTSTANDING SHARES OF IMAGE COLLISION, LTD., PETITIONER-RESPONDENT-APPELLANT, FOR THE DISSOLUTION OF IMAGE COLLISION, LTD., A DOMESTIC BUSINESS CORPORATION, RESPONDENT-APPELLANT-RESPONDENT.
(PROCEEDING NO. 1.)

MEMORANDUM AND ORDER

PAUL TRINKWALDER, INDIVIDUALLY AND AS A SHAREHOLDER OF IMAGE COLLISION, LTD., AND SUING IN THE RIGHT OF IMAGE COLLISION, LTD., PLAINTIFF-APPELLANT-RESPONDENT,

V

RODNEY J. MCKEOWN, INDIVIDUALLY AND AS A SHAREHOLDER OF IMAGE COLLISION, LTD., AND RODNEY J. MCKEOWN, DOING BUSINESS AS RJM AUTOMOTIVE, DEFENDANT-RESPONDENT-APPELLANT.
(ACTION NO. 1.)

FEUERSTEIN & SMITH, LLP, BUFFALO (MARK E. GUGLIELMI OF COUNSEL), FOR RESPONDENT-APPELLANT-RESPONDENT AND PLAINTIFF-APPELLANT-RESPONDENT.

LAW OFFICES OF JON LOUIS WILSON, LOCKPORT (JON ROSS WILSON OF COUNSEL), FOR PETITIONER-RESPONDENT-APPELLANT AND DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), dated March 17, 2011. The order, inter alia, granted the application of Rodney J. McKeown for dissolution.

It is hereby ORDERED that said cross appeal is unanimously dismissed insofar as it concerns the disqualification of an attorney from representing respondent-plaintiff in the future and the order is modified on the law by providing that the interest shall run from the date of the filing of the dissolution petition, and as modified the order is affirmed without costs in accordance with the following Memorandum: Petitioner-defendant Rodney J. McKeown, the petitioner in proceeding No. 1 and the defendant in action No. 1 (petitioner), commenced proceeding No. 1 pursuant to Business Corporation Law §

1104-a, seeking the dissolution of Image Collision, Ltd. (ICL), a closely held corporation owned 50% by petitioner and 50% by Paul Trinkwalder, the respondent in proceeding No. 1 and the plaintiff in action No. 1 (respondent). Respondent commenced action No. 1 against petitioner, seeking, inter alia, damages for money allegedly taken from ICL by petitioner and business opportunities of ICL allegedly converted by petitioner. The proceeding and action were consolidated for trial. Respondent appeals and petitioner cross-appeals from an order that, inter alia, granted petitioner's application for dissolution, awarded respondent the continued use of ICL's business, awarded petitioner 70% of the value of the corporation, and dismissed the complaint in respondent's action.

Contrary to respondent's contention on his appeal, "Supreme Court's valuation of [the] Corporation and of petitioner's shares is supported by the evidence in the record, and respondent's contrary interpretations of fact and credibility do not warrant disturbing the court's determinations . . . 'The determination of a fact-finder as to the value of a business, if it is within the range of testimony presented, will not be disturbed on appeal where valuation of the business rested primarily on the credibility of expert witnesses and their valuation techniques' " (*Matter of Penepent Corp.* [appeal No. 11], 198 AD2d 782, 783, *lv denied* 83 NY2d 797; *see Matter of F.P.D. Realty Corp.*, 267 AD2d 111, 112; *Matter of North Star Elec. Contr.-N.Y.C. Corp.*, 174 AD2d 373, 373-374, *lv denied* 79 NY2d 752). Also contrary to respondent's contention, he failed to establish that petitioner engaged in oppressive behavior within the meaning of Business Corporation Law § 1104-a before respondent denied petitioner access to ICL's equipment and accounts by locking petitioner out of the corporation's premises and changing all the locks and passwords (*see generally Matter of Kemp & Beatley, Inc. [Gardstein]*, 64 NY2d 63, 72-73). Although respondent established that petitioner set up another business in 1998, the evidence also supports the court's conclusion that petitioner did so in response to respondent's oppressive acts, including buying the premises upon which ICL conducted business and then raising the rent to siphon away corporate profits, thereby depriving petitioner of his reasonable expectation that he would receive one half of ICL's earnings. The evidence also supports the court's further conclusion that, in 2002, respondent completely locked petitioner out of the business without compensation for his part of the corporation's value. Conversely, the evidence fails to support respondent's contention that petitioner's other business resulted in any diminution in the value of ICL.

Respondent did not object at trial to the qualifications of petitioner's financial expert, a certified public accountant with more than 50 years of experience that included valuing businesses, and he therefore failed to preserve for our review his contention that the expert is not qualified to valuate the business (*see generally Matter of Alexis Marie P.*, 45 AD3d 458, 459, *lv denied* 10 NY3d 705; *Koffler v Biller*, 262 AD2d 150, 151; *Smith v City of New York*, 238 AD2d 500, 500).

With respect to the cross appeal, we agree with petitioner that

the court, in directing that interest accrue on the award, should have directed that the interest run from the date of the filing of the petition (*see Matter of Whalen v Whalen's Moving & Stor. Co.*, 234 AD2d 552, 554; *see generally Matter of Pace Photographers [Rosen]*, 71 NY2d 737, 748). We therefore modify the order accordingly. Petitioner further contends that the attorney who previously represented ICL should be disqualified from representing respondent in the future. "Where, as here, 'the rights of the parties cannot be affected by the determination of [the] appeal,' the appeal must be dismissed as moot" (*Matter of Mattar v Heckl*, 77 AD3d 1390, 1391, quoting *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714). Thus, even assuming, arguendo, that petitioner preserved that contention for our review, we nevertheless dismiss the cross appeal insofar as it seeks that relief.

We have considered the remaining contentions of the parties and conclude that they are without merit.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

522

CA 11-02457

PRESENT: SCUDDER, P.J., SMITH, FAHEY, CARNI, AND SCONIERS, JJ.

TERENCE WINTERS AND MAUREEN WINTERS,
PLAINTIFFS-RESPONDENTS,

V ORDER

UNILAND DEVELOPMENT CORPORATION, UNILAND CONSTRUCTION CORPORATION, COZZWILL, INC.,
DEFENDANTS,
AND BUREAU VERITAS CONSUMER PRODUCTS SERVICES, INC., DEFENDANT-APPELLANT.

THE LAW OFFICES OF EDWARD M. EUSTACE, WHITE PLAINS (HEATH A. BENDER OF COUNSEL), FOR DEFENDANT-APPELLANT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (DEBRA A. NORTON OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

BROWN & KELLY, LLP, BUFFALO (ANDREW D. MERRICK OF COUNSEL), FOR DEFENDANTS UNILAND DEVELOPMENT CORPORATION AND UNILAND CONSTRUCTION CORPORATION.

LIPPMAN O'CONNOR, BUFFALO (GERARD E. O'CONNOR OF COUNSEL), FOR DEFENDANT COZZWILL INC.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (MELISSA A. FOTI OF COUNSEL), FOR THIRD-PARTY DEFENDANT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered October 12, 2011 in a personal injury action. The order, insofar as appealed from, denied the motion of defendant Bureau Veritas Consumer Products Services, Inc. for summary judgment.

Now, upon the stipulation discontinuing action signed by the attorneys for the parties on March 27, 2012, and filed in the Erie County Clerk's Office on March 28, 2012,

It is hereby ORDERED that said appeal is unanimously dismissed without costs upon stipulation.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

523

CA 11-01898

PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND SCONIERS, JJ.

MARIA BERRY, PLAINTIFF-APPELLANT,

V ORDER

ANGELO CHIODO HEATING & AIR CONDITIONING,
DEFENDANT-RESPONDENT.

MARK FALCO, NEW YORK CITY, FOR PLAINTIFF-APPELLANT.

WHITELAW & FANGIO, SYRACUSE (KENNETH D. WHITELAW OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Onondaga County Court (William D. Walsh, J.), entered November 17, 2010. The order reversed in part and affirmed in part a judgment of the Syracuse City Court (Karen M. Uplinger, J.), entered April 26, 2010, and remitted for further proceedings.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

525

TP 11-02235

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, AND MARTOCHE, JJ.

IN THE MATTER OF RONNIE COVINGTON, PETITIONER,

V ORDER

JOHN LEMPKE, SUPERINTENDENT, FIVE POINTS CORRECTIONAL FACILITY, RESPONDENT.

RONNIE COVINGTON, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Seneca County [Dennis F. Bender, A.J.], entered November 2, 2011) to review a determination of respondent. The determination found after a Tier II hearing that petitioner had violated an inmate rule.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

527

KA 11-00640

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JAMELL B. MORGAN, DEFENDANT-APPELLANT.

WILLIAMS, HEINL, MOODY & BUSCHMAN, P.C., AUBURN (RYAN JAMES MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered March 8, 2011. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

528

KA 11-00549

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RACHEL E. RAMIREZ, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (MARY-JEAN BOWMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered February 4, 2011. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

529

KA 08-02651

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JIMMIE L. SIMMONS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered October 30, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

530

KA 10-00028

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ENRIQUE C. RUSH, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (LAURA T. BITTNER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Mark A. Violante, A.J.), rendered December 10, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted rape in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted rape in the second degree (Penal Law §§ 110.00, 130.30 [1]). We reject defendant's contention that his waiver of the right to appeal was not knowingly, voluntarily, and intelligently entered (*see People v Lopez*, 6 NY3d 248, 256). "County Court expressly ascertained from defendant that, as a condition of the plea, he was agreeing to waive his right to appeal, and the court did not conflate that right with those automatically forfeited by a guilty plea" (*People v Thompson*, 83 AD3d 1535, 1535 [internal quotation marks omitted]; *see People v Harris*, 77 AD3d 1326, *lv denied* 16 NY3d 743). " 'The valid waiver of the right to appeal encompasses defendant's contention concerning the [ultimate] denial of his request for youthful offender status' " (*People v Lyons*, 86 AD3d 930, 931, *lv denied* 17 NY3d 954; *see Harris*, 77 AD3d 1326), as well as his contention concerning the severity of the sentence (*see Lopez*, 6 NY3d at 255-256; *Lyons*, 86 AD3d at 931).

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

532

KA 10-02124

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALLEN MORRIS, DEFENDANT-APPELLANT.

MATTHEW E. BROOKS, LOCKPORT, FOR DEFENDANT-APPELLANT.

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN, FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered October 4, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). Defendant contends that County Court abused its discretion in denying his motion to withdraw the guilty plea on the ground that he was misinformed with respect to the negotiated sentence to be imposed. Although defendant's contention survives his waiver of the right to appeal (*see People v Sparcino*, 78 AD3d 1508, 1509, *lv denied* 16 NY3d 746), we conclude that it is without merit. " 'Permission to withdraw a guilty plea rests solely within the court's discretion . . . , and refusal to permit withdrawal does not constitute an abuse of that discretion unless there is some evidence of innocence, fraud, or mistake in inducing the plea' " (*People v Pillich*, 48 AD3d 1061, *lv denied* 11 NY3d 793; *see People v Alexander*, 97 NY2d 482, 485). There is no such evidence here. Rather, the record establishes that the court properly informed defendant that the negotiated sentence was required to run consecutively to the prior undischarged sentence that defendant was serving at that time, and that any jail time credit to be applied would be determined by the Department of Correctional Services (*see* § 70.25 [2-a]; § 70.30 [3]; Correction Law § 600-a; *cf. People v Lee*, 64 AD3d 1236, 1237; *People v Ingoglia*, 305 AD2d 1002, 1003, *lv denied* 100 NY2d 583).

Defendant further contends that the court failed to make an appropriate inquiry into his two requests for substitution of counsel. The initial request for new assigned counsel was set forth in a brief

notation in defense counsel's "status report" to the court indicating that defendant did not wish to accept the plea offer made during a pretrial conference. No reasons were provided for defendant's request, and defendant did not repeat that request or raise any complaints concerning defense counsel's representation at subsequent appearances before the court. Defendant's contention with respect to his initial request for substitution of counsel "is encompassed by the plea and the waiver of the right to appeal except to the extent that the contention implicates the voluntariness of the plea" (*People v Phillips*, 56 AD3d 1163, 1164, *lv denied* 12 NY3d 761; *see People v Williams*, 6 AD3d 746, 747, *lv denied* 3 NY3d 650). In any event, defendant abandoned that request when he "decid[ed] . . . to plead guilty while still being represented by the same attorney" (*People v Hobart*, 286 AD2d 916, 916, *lv denied* 97 NY2d 683; *see People v Munzert*, 92 AD3d 1291, 1292; *People v Ocasio*, 81 AD3d 1469, 1470, *lv denied* 16 NY3d 898, *cert denied* ___ US ___, 132 S Ct 318).

Defendant made a second request for substitution of counsel at sentencing. To the extent that defendant's contention with respect to the second request implicates the voluntariness of the plea and thus survives the plea and the waiver of the right to appeal, we conclude that the court made a sufficient inquiry into that request (*see generally People v Porto*, 16 NY3d 93, 99-100). " '[T]he court afforded defendant the opportunity to express his objections concerning [defense counsel], and the court thereafter reasonably concluded that defendant's . . . objections had no merit or substance' " (*People v Adger*, 83 AD3d 1590, 1592, *lv denied* 17 NY3d 857).

The contention of defendant that he was denied effective assistance of counsel does not survive either the plea of guilty or the waiver of the right to appeal inasmuch as defendant made "no showing that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [defense counsel's] allegedly poor performance" (*People v Robinson*, 39 AD3d 1266, 1267, *lv denied* 9 NY3d 869 [internal quotation marks omitted]; *see generally People v Nieves*, 299 AD2d 888, 889, *lv denied* 99 NY2d 631). Defendant's further contention that the court erred in denying that part of his omnibus motion seeking to dismiss the indictment also "does not survive his valid waiver of the right to appeal . . ., nor in any event does it survive his guilty plea" (*People v Baker*, 49 AD3d 1293, *lv denied* 10 NY3d 932; *see People v Crumpler*, 70 AD3d 1396, 1397, *lv denied* 14 NY3d 839). Finally, defendant's contention with respect to his motion to vacate the judgment and to set aside the sentence pursuant to CPL 440.10 and 440.20 is "not properly before us on appeal from the judgment of conviction" (*People v Moore*, 81 AD3d 1325, 1325, *lv denied* 16 NY3d 897).

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

534

KA 09-00297

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TARIAS D. WILLIAMS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), rendered August 8, 2008. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [1]), defendant contends that the evidence is legally insufficient to establish that he intended to cause serious physical injury to the 66-year-old victim. We reject that contention. The victim and another witness testified at trial that defendant repeatedly punched the victim in the face while he was standing and after defendant had knocked him to the ground. Further, defendant struck the victim with sufficient force to cause a retrobulbar hemorrhage, as well as a fracture of the orbit, complete displacement of the lens and damage to the retina of the victim's right eye, which resulted in permanent partial loss of vision. Defendant is " 'presumed to intend the natural and probable consequences of his actions' " (*People v Roman*, 13 AD3d 1115, 1116, *lv denied* 4 NY3d 802), and the natural and probable consequence of repeatedly punching a defenseless man in the face is that he will sustain a serious physical injury within the meaning of Penal Law § 10.00 (10) (*see People v Meacham*, 84 AD3d 1713, 1714, *lv denied* 17 NY3d 808; *People v Angelo M.*, 231 AD2d 925, 925-926, *lv denied* 89 NY2d 862, 1087).

The sentence is not unduly harsh or severe.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

535

CAF 10-02110

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, AND MARTOCHE, JJ.

IN THE MATTER OF JOHN LEONARDO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ELAINA M. LEONARDO, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (ELIZABETH deV. MOELLER OF COUNSEL), FOR PETITIONER-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (KRISTEN MCDERMOTT OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered August 30, 2010 in a proceeding pursuant to Family Court Act article 4. The order, among other things, directed petitioner to pay the sum of $282 per week in child support.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Petitioner father commenced this proceeding seeking a downward modification of his child support obligation based on a change in employment. In the amended petition, the father sought to vacate the prior order of support and to require respondent mother to pay him support because he had physical custody of the children for more time than the mother. Following a hearing, the Support Magistrate granted the father's amended petition in part by reducing his support obligation. Family Court denied the objections of the father to the Support Magistrate's order and modified that order by denying the amended petition in its entirety and increasing the father's support obligation.

The father contends that the Support Magistrate did not have jurisdiction to hear and determine this proceeding because the father alleged that he was now the custodial parent (*see generally* Family Ct Act § 439 [a]). We reject that contention. The Support Magistrate properly considered the current custodial arrangement in determining which parent was the custodial parent for purposes of child support (*see Matter of Hunt v Bartley*, 85 AD3d 1275, 1276-1277; *Matter of Moore v Shapiro*, 30 AD3d 1054, 1055). Contrary to the father's further contention, the court properly imputed income to him and

denied his amended petition in its entirety. With respect to the father's allegation in the amended petition that he was entitled to a vacatur of the order of support or a downward modification of his support obligation on the ground that he was spending more time with the children, the Support Magistrate and the court properly determined that he remained the noncustodial parent for child support purposes (*see generally Bast v Rossoff*, 91 NY2d 723, 728-732). With respect to the father's further allegation in the amended petition that he was entitled to a downward modification of his support obligation on the ground that he was no longer employed full time, that fact did not constitute the requisite change in circumstances because the father presented no evidence establishing that he diligently sought re-employment commensurate with his former employment (*see Matter of Muselevichus v Muselevichus*, 40 AD3d 997, 999; *see also Jelfo v Jelfo*, 81 AD3d 1255, 1257). The court therefore properly imputed income to the father because he failed to demonstrate that he was unable to earn the same salary that he was earning at the time of the judgment of divorce (*see Matter of Monroe County Support Collection Unit v Wills*, 21 AD3d 1331, 1332, *lv denied* 6 NY3d 705; *see also Filiaci v Filiaci*, 68 AD3d 1810, 1811).

Finally, the father contends that he was denied effective assistance of counsel. The father did not have a right to counsel in this child support modification proceeding (*see* Family Ct Act § 262 [a]; *Matter of Commissioner of Social Servs. of City of N.Y. v Remy K.Y.*, 298 AD2d 261, 262). The father's contention therefore may not be considered absent extraordinary circumstances, which are not present here (*see Lewis v Lewis*, 70 AD3d 1432, 1434; *Matter of Ferrara v Ferrara*, 52 AD3d 599, 600, *lv denied* 11 NY3d 706; *Matter of Cichosz v Cichosz*, 12 AD3d 598, 599).

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

537

CAF 11-01312

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, AND MARTOCHE, JJ.

IN THE MATTER OF CHAD A. WALTERS,
PETITIONER-RESPONDENT,

V ORDER

ARLOA WEST, RESPONDENT-APPELLANT.

ROBERT A. DINIERI, CLYDE, FOR RESPONDENT-APPELLANT.

ELIZABETH A. SAMMONS, WILLIAMSON, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Wayne County (Dennis M. Kehoe, J.), dated March 31, 2011 in a proceeding pursuant to Family Court Act article 6. The order awarded custody of the parties' children to petitioner.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Family Court.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

538

CAF 11-00502

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, SCONIERS, AND MARTOCHE, JJ.

IN THE MATTER OF ANGEL M. HAYNES AND ROBERT HAYNES, PETITIONERS-RESPONDENTS-RESPONDENTS,

V ORDER

ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES, ET AL., RESPONDENTS, AND SUZANNE M. LOCKWOOD, RESPONDENT-PETITIONER-APPELLANT.

KELLY M. CORBETT, FAYETTEVILLE, FOR RESPONDENT-PETITIONER-APPELLANT.

LEGAL AID SOCIETY OF MID-NEW YORK, SYRACUSE (GIGI MEYERS OF COUNSEL), FOR PETITIONERS-RESPONDENTS-RESPONDENTS.

GORDON J. CUFFY, COUNTY ATTORNEY, SYRACUSE (JOSEPH MILITI OF COUNSEL), FOR RESPONDENT ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES.

TERRI BRIGHT, ATTORNEY FOR THE CHILD, FABIUS, FOR SHYANNA L.

Appeal from an order of the Family Court, Onondaga County (Gina M. Glover, R.), entered February 25, 2011 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted petitioners-respondents Angel M. Haynes and Robert Haynes joint legal and physical custody of the subject child.

Now, upon the stipulation and order of Family Court, Onondaga County, entered March 1, 2012 and upon reading and filing the stipulation of discontinuance sworn to by respondent-petitioner on February 22, 2012, and signed by respondent-petitioner’s attorney on March 7, 2012,

It is hereby ORDERED that said appeal is unanimously dismissed without costs upon stipulation.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

539

CAF 10-00110

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, AND MARTOCHE, JJ.

IN THE MATTER OF LEEANN S. AND MICHAEL S.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

MICHAEL S., RESPONDENT-APPELLANT.

CARA A. WALDMAN, FAIRPORT, FOR RESPONDENT-APPELLANT.

JOHN A. HERBOWY, COUNTY ATTORNEY, UTICA (DENISE J. MORGAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

PETER J. DIGIORGIO, JR., ATTORNEY FOR THE CHILDREN, UTICA, FOR LEEANN S. AND MICHAEL S.

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered November 17, 2009 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudicated the children to be abused and neglected.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Respondent father appeals from an order of fact-finding and disposition determining that he sexually abused his daughter and derivatively neglected his son. We reject the contention of the father that Family Court's finding of sexual abuse is not supported by the requisite preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]). "A child's out-of-court statements may form the basis for a finding of [abuse] as long as they are sufficiently corroborated by [any] other evidence tending to support their reliability" (*Matter of Nicholas L.*, 50 AD3d 1141, 1142; *see* § 1046 [a] [vi]). Here, the out-of-court statements of the daughter were sufficiently corroborated by the testimony of petitioner's expert witness, who found the daughter's consistent accounts of the abuse to be reliable and opined that her "statements parallel those normally made by abuse victims" (*Matter of Nikita W.*, 77 AD3d 1209, 1210; *see Matter of Thomas N.*, 229 AD2d 666, 668).

We reject the further contention of the father that the court erred in determining that he derivatively neglected his son. The record supports the determination of the court that the father's sexual abuse of the daughter demonstrated " 'fundamental flaws in [his] understanding of the duties of parenthood' " and warranted a

finding of derivative neglect with respect to the son (*Matter of Michelle M.*, 52 AD3d 1284, 1284; *see Matter of James A.*, 217 AD2d 961).

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

540

CAF 11-00390

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, AND MARTOCHE, JJ.

IN THE MATTER OF JOHN LEONARDO,
PETITIONER-RESPONDENT-APPELLANT,

V ORDER

ELAINA LEONARDO,
RESPONDENT-PETITIONER-RESPONDENT.
(APPEAL NO. 2.)

KELLY M. CORBETT, FAYETTEVILLE, FOR PETITIONER-RESPONDENT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (KRISTEN MCDERMOTT OF COUNSEL), FOR RESPONDENT-PETITIONER-RESPONDENT.

LAURA ESTELA CARDONA, ATTORNEY FOR THE CHILDREN, SYRACUSE, FOR CHARLES L., LIBBIE L. AND JOHN R.L.

Appeal from an order of the Supreme Court, Onondaga County (Michael L. Hanuszczak, A.J.), entered January 18, 2011 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded respondent-petitioner sole custody of the subject children.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

541

CAF 11-00761

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, AND MARTOCHE, JJ.

IN THE MATTER OF DAVID J. LEE,
PETITIONER-APPELLANT,

V ORDER

BREANNA HARRIS, RESPONDENT-RESPONDENT.

WILLIAM D. BRODERICK, JR., ELMA, FOR PETITIONER-APPELLANT.

LAW OFFICE OF GARY M. FREEDMAN, ESQ., BUFFALO (GARY M. FREEDMAN OF COUNSEL), FOR RESPONDENT-RESPONDENT.

DAVID B. SMITH, ATTORNEY FOR THE CHILDREN, BUFFALO, FOR DEJA L. AND DEJANEA L.

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered March 9, 2011 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

542

CAF 10-02474

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, AND MARTOCHE, JJ.

IN THE MATTER OF ARIEL C.W.-H.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, ORDER
PETITIONER-RESPONDENT;

CHRISTINE W., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

EFTIHIA BOURTIS, ROCHESTER, FOR RESPONDENT-APPELLANT.

DAVID VAN VARICK, COUNTY ATTORNEY, ROCHESTER (CAROL L. EISENMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

TANYA J. CONLEY, ATTORNEY FOR THE CHILD, ROCHESTER, FOR ARIEL C.W.-H.

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered October 26, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Family Court.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

543

CAF 10-02475

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, AND MARTOCHE, JJ.

IN THE MATTER OF NYASIA W.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, ORDER
PETITIONER-RESPONDENT;

CHRISTINE W., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

EFTIHIA BOURTIS, ROCHESTER, FOR RESPONDENT-APPELLANT.

DAVID VAN VARICK, COUNTY ATTORNEY, ROCHESTER (CAROL L. EISENMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

TANYA J. CONLEY, ATTORNEY FOR THE CHILD, ROCHESTER, FOR NYASIA W.

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered October 26, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Family Court.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

545

CA 11-01318

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, AND MARTOCHE, JJ.

NORA OSMON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ISKALO DEVELOPMENT CORPORATION, DEFENDANT,
AND H&M PLUMBING & MECHANICAL CONTRACTING, INC.,
DEFENDANT-APPELLANT.

GOLDBERG SEGALLA LLP, ALBANY (MATTHEW S. LERNER OF COUNSEL), FOR DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOHN A. COLLINS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered September 23, 2010 in a personal injury action. The order, insofar as appealed from, granted that part of the motion of plaintiff to set aside the jury verdict with respect to defendant H&M Plumbing & Mechanical Contracting, Inc.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the post-trial motion is denied in its entirety and the verdict with respect to defendant H&M Plumbing & Mechanical Contracting, Inc. is reinstated.

Memorandum: Defendant H&M Plumbing & Mechanical Contracting, Inc. (H&M) appeals from an order granting that part of plaintiff's post-trial motion to set aside a jury verdict in favor of H&M. We reverse the order insofar as appealed from, deny the post-trial motion in its entirety and reinstate the jury verdict with respect to H&M. Plaintiff commenced this action seeking damages for injuries she sustained when she tripped over a ladder at property owned by defendant Iskalo Development Corporation (Iskalo). Iskalo entered into a contract with H&M to perform plumbing work on the premises. It is undisputed that plaintiff tripped over a ladder owned by H&M, but the jury's conclusion that H&M was not negligent is supported by the record. Although the evidence established that the ladder was marked as belonging to H&M, it was unclear who placed the ladder in the hallway where plaintiff fell. The jury was entitled to determine that an employee of H&M did not place the ladder in the hallway or that the ladder's brief and slight incursion into the hallway was not a dangerous condition. Thus, we conclude that the jury's determination is one that reasonably could have been rendered based on the evidence

presented at trial (*see Ruddock v Happell*, 307 AD2d 719, 720-721).

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

546

CA 11-02409

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, AND SCONIERS, JJ.

NEW YORK STATE THRUWAY AUTHORITY,
PLAINTIFF-APPELLANT,

V ORDER

KTA-TATOR ENGINEERING SERVICES, P.C.,
DEFENDANT-RESPONDENT.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (SERRA A. AYGUN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (WILLIAM D. CHRIST OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), dated April 19, 2011. The order granted the motion of defendant for summary judgment and dismissed the complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

547

CA 11-02255

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, AND MARTOCHE, JJ.

FAHD A. ALI, PLAINTIFF-RESPONDENT,

V ORDER

WEICHERT REALTORS, DEFENDANT-APPELLANT.

PETER J. DIGIORGIO, JR., UTICA, FOR DEFENDANT-APPELLANT.

Appeal from an order of the Oneida County Court (Michael L. Dwyer, J.), entered March 15, 2011. The order affirmed an amended judgment of the Utica City Court (Albert A. Alteri, J.H.O.), entered July 30, 2010 in favor of plaintiff.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

550

CA 11-02222

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, AND MARTOCHE, JJ.

CB RICHARD ELLIS-BUFFALO, LLC,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

KUNVARJI HOTELS, INC. AND BHAGWANJI KUNVARJI,
DEFENDANTS-RESPONDENTS.

LEWANDOWSKI & ASSOCIATES, WEST SENECA (LINDSAY M. SWENSEN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

DAMON MOREY LLP, BUFFALO (BRIAN D. GWITT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered July 21, 2011 in a breach of contract action. The order, inter alia, granted defendants' motion to dismiss plaintiff's complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff, a real estate broker, commenced this action seeking to recover the commission allegedly due for services it provided to defendants in connection with the lease of commercial real property by defendant Kunvarji Hotels, Inc. (KHI). Supreme Court properly granted defendants' motion to dismiss the complaint and denied plaintiff's cross motion seeking partial summary judgment on liability with respect to the breach of contract and quantum meruit causes of action. Pursuant to CPLR 213, a six-year limitations period applies to the causes of action premised upon breach of contract (*see Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402-403), quantum meruit (*see Erdheim v Gelfman*, 303 AD2d 714, 714, *lv denied* 100 NY2d 514), and unjust enrichment (*see Sirico v F.G.G. Prods., Inc.*, 71 AD3d 429, 434). Each of those causes of action accrued when plaintiff earned its commission, i.e., the date on which KHI and the tenant executed the lease agreement (*see Feinberg Bros. Agency v Berted Realty Co.*, 70 NY2d 829, 830; *Gronich & Co. v 649 Broadway Equities Co.*, 169 AD2d 600, 602). The lease agreement was executed in January 2005 and the instant action was commenced more than six years later, on February 23, 2011. Thus, the causes of action at issue are time-barred.

The court properly denied plaintiff's cross motion on the further

ground that issue had not been joined (*see* CPLR 3212 [a]; *Matter of Estate of Jason v Herdman*, 70 AD3d 1382). Finally, we note that plaintiff has not raised any contention in its brief concerning the dismissal of the two remaining causes of action, and thus it has abandoned any issues with respect thereto (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

551

KA 10-00038

PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALEXIS OBERLANDER, DEFENDANT-APPELLANT.

DEMARIE & SCHOENBORN, P.C., BUFFALO (JOSEPH DEMARIE OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered January 4, 2010. The judgment convicted defendant, upon a jury verdict, of offering a false instrument for filing in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the facts, the indictment is dismissed and the matter is remitted to Genesee County Court for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of one count of offering a false instrument for filing in the first degree (Penal Law § 175.35). The conviction arises from defendant's failure, with the alleged intent to defraud the Genesee County Department of Social Services (DSS), to report on an application for food stamp benefits that the father of her youngest child (hereafter, father) was living in the household. On a prior appeal, we dismissed 12 of the 13 counts of the indictment for lack of legally sufficient evidence, and we granted a new trial on the instant count (*People v Oberlander*, 60 AD3d 1288).

Contrary to the contention of defendant, when viewing the evidence in the light most favorable to the People and affording the People "all reasonable evidentiary inferences," we conclude that the evidence is legally sufficient to support the conviction (*People v Delamota*, 18 NY3d 107, 113). We nevertheless agree with defendant that the verdict is against the weight of the evidence.

The Court of Appeals has recently reiterated that, in reviewing the weight of the evidence, we must "affirmatively review the record; independently assess all of the proof; substitute [our] own credibility determinations for those made by the jury in an

appropriate case; determine whether the verdict was factually correct; and acquit a defendant if [we are] not convinced that the jury was justified in finding that guilt was proven beyond a reasonable doubt" (*id.* at 116-117).

The theory of the prosecution's case was that the father lived with defendant at an address in Batavia when she filed her application for recertification for food stamp benefits on November 2, 2005 and that he moved with defendant and her children to another location in mid-November. It is undisputed that defendant advised DSS officials of her intent to move. It is also undisputed that defendant advised a DSS employee in January 2006 that the father would be moving in with her at the new location. The People presented the testimony of the boyfriend of defendant's coworker (hereafter, coworker's boyfriend), who had lived with defendant and provided child care for her at the Batavia residence, as well as the testimony of the coworker herself (coworker). The coworker's boyfriend testified that the father lived with defendant at the Batavia residence and moved with her to the new residence in November 2005. Defendant, the father, as well as defendant's mother, who also cared for the children while defendant worked two jobs and attended business school, all testified that the father did not live with defendant until he moved in with her in January 2006. DSS records reflect that, prior to January 2006 the father resided at an address in Medina, which the father testified was his mother's residence.

After he was granted immunity from prosecution, the coworker's boyfriend testified that he and the coworker "often" smoked crack cocaine while he was caring for defendant's children. He denied that defendant was upset with him when she learned in October 2005 that he had been using drugs while caring for the children. Defendant, however, testified that she and the coworker's boyfriend had a "huge" argument when she learned of his drug use and that, as a result of that information, she advised him that he was no longer welcome to move with her to the new address, as they had planned.

The coworker testified that, in late December 2005, defendant was "visibly upset" when she told the coworker and another coworker that she had lied on her recertification application in early November by failing to report that the father was living with her. Defendant, however, testified that she was upset at the time in question while telling the coworkers about an investigation by Child Protective Services regarding her oldest child that, as she testified, was later determined to be unfounded.

With respect to the conflicting testimony whether the father was living with defendant prior to January 2006, we find that the testimony of both the coworker's boyfriend and the coworker is not credible and that the testimony of defendant and her mother is credible. We therefore conclude that the jury did not properly " 'weigh the relative probative force of [the] conflicting testimony and the relative strength of [the] conflicting inferences that may be drawn from the testimony' " (*People v Bleakley*, 69 NY2d 490, 495).

With respect to the documentary evidence in the form of a rental agreement for the new residence that contained the signatures of both defendant and the father, i.e., People's exhibit 9, we note that the landlord testified that he could not recall whether he was present when defendant signed the document, or when and by whom the agreement containing both signatures was returned to him. Defendant, however, testified that she signed the agreement on October 14, 2005, the date reflected on the agreement, in the presence of the landlord, and that the father was not present. Defendant further testified that, when she advised the landlord that the father would be moving into the residence, the landlord informed her that the father was required to sign the rental agreement. Defendant also testified that, on her original copy of the rental agreement, i.e., defendant's exhibit B, which she provided to DSS with her application for recertification, the landlord noted his receipt of the security deposit. We have reviewed the originals of both exhibits and conclude that two original rental agreements were signed by defendant on October 14, 2005. The landlord acknowledged the receipt of the security deposit on the document that defendant retained and the father signed the document that the landlord retained. The documentary evidence however, when considered together with the landlord's testimony and defendant's testimony, is inconclusive with respect to when the father signed the agreement. Therefore, with respect to whether People's exhibit 9 established that the father lived with defendant before January 2006, we conclude that the jury "failed to give the evidence the weight it should be accorded" (*id.*).

Because we conclude that the verdict is against the weight of the evidence, we reverse the judgment and dismiss the indictment (*see Delamota*, 18 NY3d at 117). In light of our determination, we need not address defendant's remaining contentions.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

555

KA 10-02189

PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOSE L. CARRASQUILLO, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES ECKERT OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Frank P. Geraci, Jr., A.J.), entered September 27, 2010. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

558

KA 08-01685

PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEROY BROWN, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered May 21, 2008. The judgment convicted defendant, upon a jury verdict, of criminal contempt in the first degree and harassment in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal contempt in the first degree (Penal Law § 215.51 [b] [v]) and harassment in the second degree (§ 240.26 [1]). Defendant failed to preserve for our review his contention that he was deprived of a fair trial based on prosecutorial misconduct during summation (*see People v McEathron*, 86 AD3d 915, 916; *People v Lyon*, 77 AD3d 1338, 1339, *lv denied* 15 NY3d 954). Specifically, defendant either failed to object to the alleged instances of misconduct (*see People v Paul*, 78 AD3d 1684, 1684-1685, *lv denied* 16 NY3d 834), or his objections thereto "were merely general objections without a specified basis" (*People v Beggs*, 19 AD3d 1150, 1151, *lv denied* 5 NY3d 803; *see People v Parks*, 66 AD3d 1429, 1430, *lv denied* 14 NY3d 804; *see generally People v Romero*, 7 NY3d 911, 912). In any event, defendant's contention is without merit. The majority of the comments in question were within " 'the broad bounds of rhetorical comment permissible' " during summations (*People v Williams*, 28 AD3d 1059, 1061, *affd* 8 NY3d 854, quoting *People v Galloway*, 54 NY2d 396, 399), and they were "either a fair response to defense counsel's summation or fair comment on the evidence" (*McEathron*, 86 AD3d at 916 [internal quotation marks omitted]). "Even assuming, arguendo, that some of the prosecutor's comments were beyond those bounds, we conclude that they were not so egregious as to deprive defendant of a

fair trial" (*id.*).

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

562

KA 11-01413

PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MOHAMED A. MOHAMED, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SUSAN C. MINISTERO OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. SMALL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered March 28, 2011. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him following a jury verdict of assault in the second degree (Penal Law § 120.05 [2]), defendant contends that the conviction is not supported by legally sufficient evidence. As defendant correctly concedes, his challenge to the legal sufficiency of the evidence is not preserved for our review because he failed to renew his motion for a trial order of dismissal at the close of his proof (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, his contention lacks merit.

Defendant does not dispute that the victim sustained physical injuries after he was assaulted with a blunt object by two men. Defendant also does not dispute that one of the two assailants was his brother. The only issue at trial was the identity of the second assailant. The victim was unable to identify the second assailant, testifying on the issue of identity only that the two assailants spoke to each other in Arabic. The prosecution, however, offered the testimony of an accomplice, defendant's former girlfriend. She testified that, earlier on the night of the assault, defendant and his brother had been involved in a bar fight with the victim and friends of the victim, following which defendant's brother sustained injuries. The accomplice testified that she left the bar with defendant and his brother. The two men asked her to invite the victim, with whom she was familiar, to her house. Once the victim arrived, defendant and his brother assaulted the victim.

Contrary to defendant's contention, the accomplice's testimony was sufficiently corroborated. " '[C]orroborative evidence need not show the commission of the crime; it need not show that defendant was connected with the commission of the crime. It is enough if it tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the accomplice is telling the truth' " (*People v Reome*, 15 NY3d 188, 191-192). Numerous prosecution witnesses testified concerning the bar fight between the two groups of men. In addition, the accomplice's cousin testified that she saw the accomplice leave the bar with defendant and his brother shortly before the assault occurred. Telephone records establish that the accomplice contacted the victim several times shortly before the assault occurred. We thus conclude that there was sufficient evidence " 'to connect the defendant with the commission of the crime' " (*id.* at 192).

We likewise reject defendant's contention that the verdict is against the weight of the evidence. Any inconsistencies in the testimony did not render the accomplice's testimony "incredible and unbelievable, that is, impossible of belief because it [was] manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Wallace*, 306 AD2d 802, 802-803 [internal quotation marks omitted]; *see People v Young*, 55 AD3d 1234, 1235-1236, *lv denied* 11 NY3d 901). Furthermore, "[w]here, as here, witness credibility is of paramount importance to the determination of guilt or innocence, the appellate court must give '[g]reat deference . . . [to the jury's] opportunity to view the witnesses, hear the testimony and observe demeanor' " (*People v Harris*, 15 AD3d 966, 967, *lv denied* 4 NY3d 831, quoting *People v Bleakley*, 69 NY2d 490, 495; *see People v Kilbury*, 83 AD3d 1579, 1580, *lv denied* 17 NY3d 860).

The entire case rested on whether the jury credited the testimony of the accomplice and her cousin, which placed defendant with his brother at all relevant times that evening. "[A]lthough a finding that defendant was not the [second assailant] would not have been unreasonable given the lack of physical evidence and the questionable reliability of the [accomplice] who implicated defendant, it cannot be said that the jury failed to give the evidence the weight it should be accorded" (*People v McMillon*, 77 AD3d 1375, 1376, *lv denied* 16 NY3d 897).

Viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, we reject defendant's contention that he was denied effective assistance of counsel (*see generally People v Flores*, 84 NY2d 184, 187; *People v Baldi*, 54 NY2d 137, 147), and we further conclude that the sentence is not unduly harsh or severe.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

563

CAF 11-00658

PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

IN THE MATTER OF ROMEO M.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; MEMORANDUM AND ORDER

NICOLE R., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR RESPONDENT-APPELLANT.

CHARLES N. ZAMBITO, COUNTY ATTORNEY, BATAVIA (PAULA A. CAMPBELL OF COUNSEL), FOR PETITIONER-RESPONDENT.

JACQUELINE M. GRASSO, ATTORNEY FOR THE CHILD, BATAVIA, FOR ROMEO M.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered March 1, 2011 in a proceeding pursuant to Family Court Act article 10. The order adjudged that respondent had neglected the subject child and placed respondent under the supervision of petitioner.

It is hereby ORDERED that said appeal is unanimously dismissed without costs.

Memorandum: In each appeal, respondent mother appeals from an order of fact-finding and disposition entered March 1, 2011, respectively, in a proceeding pursuant to Family Court Act article 10. The orders placed the mother under petitioner's supervision pursuant to Family Court Act § 1057 upon a finding that she neglected the subject children. The orders also directed the mother to abide by certain conditions, including those set forth in an order of protection that was "issued simultaneously herewith and made part" of the two orders on appeal. On appeal, the mother seeks to modify the order of protection by striking certain provisions. We dismiss the mother's appeals as moot inasmuch as the challenged order of protection has, by its terms, expired (*see Matter of Justin CC.*, 86 AD3d 725, 726; *see generally Matter of Sarah C.B.*, 91 AD3d 1282, 1283). "[A]ny corrective measures which this Court might undertake would have no practical effect" (*Matter of Leslie H. v Carol M.D.*, 47 AD3d 716, 716; *see Matter of Kristine Z. v Anthony C.*, 43 AD3d 1284, *lv denied* 10 NY3d 705), and we conclude that the exception to the mootness doctrine does not apply herein (*see Justin CC.*, 86 AD3d at 726; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-

715).

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

564

CAF 11-00659

PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

IN THE MATTER OF JAZIEL M.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

NICOLE R., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR RESPONDENT-APPELLANT.

CHARLES N. ZAMBITO, COUNTY ATTORNEY, BATAVIA (PAULA A. CAMPBELL OF COUNSEL), FOR PETITIONER-RESPONDENT.

JACQUELINE M. GRASSO, ATTORNEY FOR THE CHILD, BATAVIA, FOR JAZIEL M.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered March 1, 2011 in a proceeding pursuant to Family Court Act article 10. The order adjudged that respondent had neglected the subject child and placed respondent under the supervision of petitioner.

It is hereby ORDERED that said appeal is unanimously dismissed without costs.

Same Memorandum as in *Matter of Romeo M.* (___ AD3d ___ [Apr. 20, 2012]).

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

566

CA 11-02216

PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

WILLIAM J. PEACOCK, III,
PLAINTIFF-APPELLANT-RESPONDENT,

V ORDER

JUSTIN ROBIDOUX, TRACEY L. MILES,
DEFENDANTS-RESPONDENTS,
CARL R. ESTEP AND TWIN CITY TRANSPORTATION, INC.,
DEFENDANTS-RESPONDENTS-APPELLANTS.

BROWN CHIARI LLP, LANCASTER (BRADLEY D. MARBLE OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

BURDEN, GULISANO & HICKEY, LLC, BUFFALO (JONATHAN S. HICKEY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (SHAUNA STROM OF COUNSEL), FOR DEFENDANT-RESPONDENT JUSTIN ROBIDOUX.

BOUVIER PARTNERSHIP, LLP, BUFFALO (GEORGE W. COLLINS OF COUNSEL), FOR DEFENDANT-RESPONDENT TRACEY L. MILES.

Appeal and cross appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered January 26, 2011 in a personal injury action. The order, among other things, granted the motions of defendants Justin Robidoux, Carl R. Estep and Twin City Transportation, Inc. for summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on March 26, 2012, and filed in the Erie County Clerk’s Office on April 2, 2012,

It is hereby ORDERED that said appeal and cross appeal are unanimously dismissed without costs upon stipulation.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

567

CA 11-01444

PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

THOMAS W. DECKMAN, CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 107175.)

FRANCIS M. LETRO, BUFFALO (RONALD J. WRIGHT OF COUNSEL), FOR CLAIMANT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. ARNOLD OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Court of Claims (Michael E. Hudson, J.), entered October 4, 2010 in a personal injury action. The interlocutory judgment apportioned liability after trial.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs for reasons stated in the decision at the Court of Claims.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

568

CA 11-02242

PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, AND SCONIERS, JJ.

EMMELYN LOGAN-BALDWIN AND LEROY A. BALDWIN,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

L.S.M. GENERAL CONTRACTORS, INC., BART NOTO,
INDIVIDUALLY AND AS PRESIDENT OF L.S.M. GENERAL
CONTRACTORS, INC., HENRY ISAACS HOME REMODELING
AND REPAIR, HENRY ISAACS, INDIVIDUALLY AND AS
PRESIDENT OF HENRY ISAACS HOME REMODELING AND
REPAIR, DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

MICHAEL STEINBERG, ROCHESTER, FOR PLAINTIFFS-APPELLANTS.

PHILLIPS LYTLE LLP, ROCHESTER (MARK J. MORETTI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS L.S.M. GENERAL CONTRACTORS, INC. AND BART NOTO, INDIVIDUALLY AND AS PRESIDENT OF L.S.M. GENERAL CONTRACTORS, INC.

HISCOCK & BARCLAY, LLP, ROCHESTER (ROBERT M. SHADDOCK OF COUNSEL), FOR DEFENDANTS-RESPONDENTS HENRY ISAACS HOME REMODELING AND REPAIR, AND HENRY ISAACS, INDIVIDUALLY AND AS PRESIDENT OF HENRY ISAACS HOME REMODELING AND REPAIR.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), dated January 6, 2011. The order, among other things, granted the motion of defendants Henry Isaacs Home Remodeling and Repair and Henry Isaacs, individually and as president of Henry Isaacs Home Remodeling and Repair, for summary judgment.

Now, upon the stipulation of discontinuance of appeal signed by the attorneys for plaintiffs and defendants L.S.M. General Contractors, Inc. and Bart Noto, individually and as president of L.S.M. General Contractors, Inc., on November 23, 2011,

It is hereby ORDERED that the appeal from said order insofar as it concerns defendants L.S.M. General Contractors, Inc. and Bart Noto, individually and as president of L.S.M. General Contractors, Inc., is unanimously dismissed upon stipulation and the order is modified on the law by denying in part the motion of defendants Henry Isaacs Home Remodeling and Repair and Henry Isaacs, individually and as president of Henry Isaacs Home Remodeling and Repair, and reinstating the breach of contract cause of action against those defendants and as modified the order is affirmed without costs.

Memorandum: Plaintiffs, the owners of an historic residence, contracted with defendant L.S.M. General Contractors, Inc. (LSM), through its president, to be the general contractor for a rehabilitation project on that residence. Defendant Bart Noto, sued individually and as the president of LSM, subcontracted with defendants Henry Isaacs Home Remodeling and Repair and Henry Isaacs, individually and as president of Henry Isaacs Home Remodeling and Repair (collectively, Isaacs defendants), to perform the roofing work on the project. The Isaacs defendants in turn subcontracted with defendant Hal Brewster, sued individually and as the president of defendant Hal Brewster Home Improvements, Inc. (collectively, Brewster defendants), to perform the roofing work.

The Isaacs defendants do not dispute that, when Hal Brewster performed the work on the roof, he "botched" the job, causing extensive leaking inside the house. LSM and the Isaacs defendants initially attempted to correct the problems, but they subsequently abandoned the project, leaving plaintiffs to hire others to complete the work.

Plaintiffs commenced this action, asserting breach of contract and fraud causes of action against all defendants. Plaintiffs have since obtained a default judgment against the Brewster defendants, and in a prior appeal we affirmed an order granting the cross motion of Noto for summary judgment dismissing the complaint against him in his individual capacity and for summary judgment dismissing the fraud causes of action against LSM (*Logan-Baldwin v L.S.M. Gen. Contrs., Inc.*, 48 AD3d 1220). The Isaacs defendants thereafter moved for summary judgment dismissing the complaint against them, contending that there was a lack of privity between them and plaintiffs with respect to the breach of contract cause of action and that there was a lack of evidence of fraud with respect to the remaining causes of action, as required by CPLR 3016 (b). Plaintiffs cross-moved for, inter alia, partial summary judgment on liability against the Isaacs defendants. Supreme Court, inter alia, granted the motion of the Isaacs defendants (*Logan-Baldwin v L.S.M. Gen. Contrs., Inc.*, 31 Misc 3d 174). On this appeal, plaintiffs challenge only those parts of the order that granted the motion of the Isaacs defendants and denied that part of their motion seeking partial summary judgment on liability on the breach of contract cause of action against those defendants. We therefore deem abandoned any contention by plaintiffs with respect to the order insofar as it granted that part of the Isaacs defendants' motion for summary judgment dismissing the fraud causes of action against them (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984). We agree with plaintiffs that the court erred in granting that part of the motion of the Isaacs defendants with respect to the breach of contract cause of action, but we conclude that the court properly denied plaintiffs' cross motion. We therefore modify the order accordingly.

With respect to the breach of contract cause of action against the Isaacs defendants, we note that, "[a]s a general rule, privity or its equivalent remains a predicate for imposing liability for nonperformance of contractual obligations . . . An obligation rooted

in contract may [nevertheless] engender a duty owed to those not in privity when the contracting party knows that the subject matter of a contract is intended for the benefit of others . . . An intention to benefit a third party must be gleaned from the contract as a whole" (*Van Vleet v Rhulen Agency*, 180 AD2d 846, 848-849; *see Drake v Drake*, 89 AD2d 207, 209). Thus, contrary to the contention of the Isaacs defendants, privity is not always required. Parties such as the plaintiffs herein who are "asserting third-party beneficiary rights under a contract must establish '(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [their] benefit and (3) that the benefit to [them] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [them] if the benefit is lost' " (*Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783, 786, quoting *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 336; *see DeLine v CitiCapital Commercial Corp.*, 24 AD3d 1309, 1311).

The focus is on the intent of the promisee, inasmuch as "the promisee procured the promise by furnishing the consideration therefor" (*Drake*, 89 AD2d at 209; *see Key Intl. Mfg. v Morse/Diesel, Inc.*, 142 AD2d 448, 455), and "[a] beneficiary will be considered an intended beneficiary, rather than merely an incidental beneficiary, when the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance" (*DeLine*, 24 AD3d at 1311 [internal quotation marks omitted]; *see Chavis v Klock*, 45 AD3d 1353, 1354). "Where[, as here,] performance is rendered *directly to the third party*, it is presumed that the contract was for his [or her] benefit" (*Drake*, 89 AD2d at 209 [emphasis added]; *see Tarrant Apparel Group v Camuto Consulting Group, Inc.*, 40 AD3d 556, 557; *Internationale Nederlanden [U.S.] Capital Corp. v Bankers Trust Co.*, 261 AD2d 117, 123; *Finch, Pruyn & Co. v Wilson Control Servs.*, 239 AD2d 814, 816). Indeed, "[i]t is almost inconceivable that those . . . who render their services in connection with a major construction project would not contemplate that the performance of their contractual obligations would ultimately benefit the owner . . . [I]t is obviously inferable that they knew, or should have known, that someone owned the [property], and that such person or entity was to be the ultimate beneficiary of their . . . services" (*Key Intl. Mfg.*, 142 AD2d at 455; *see City of New York [Dept. of Parks & Recreation-Wollman Rink Restoration] v Kalisch-Jarcho, Inc.*, 161 AD2d 252, 253).

Thus, courts have generally refused to dismiss breach of contract causes of action asserted by property owners against subcontractors who performed construction services on their property (*see e.g. Gap, Inc. v Fisher Dev., Inc.*, 27 AD3d 209, 210-211; *Rotterdam Sq. v Sear-Brown Assoc.*, 246 AD2d 871, 871-872; *Finch, Pruyn & Co.*, 239 AD2d at 815-816; *Facilities Dev. Corp. v Miletta*, 180 AD2d 97, 100-101; *City of New York [Dept. of Parks & Recreation-Wollman Rink Restoration]*, 161 AD2d at 253; *Key Intl. Mfg.*, 142 AD2d at 454-455; *Goodman-Marks Assoc. v Westbury Post Assoc.*, 70 AD2d 145, 148; *see also Saratoga Schenectady Gastroenterology Assoc., P.C. v Bette & Cring, LLC*, 83 AD3d 1256, 1257-1258; *cf. Board of Mgrs. of Riverview at Coll. Point*

Condominium III v Schorr Bros. Dev. Corp., 182 AD2d 664, 665-666).

Here, as in *Key Intl. Mfg.* (142 AD2d at 455), it is "almost inconceivable" that the Isaacs defendants did not know that plaintiffs, the owners of the home, would be the ultimate beneficiaries of the services being provided by the Isaacs defendants pursuant to their contract with LSM. Although there are older cases espousing the view "that the additional services performed by the subcontractor . . . are for the benefit of the general contractor who is responsible for the completion of the improvement, not for the benefit of the owner" (*Schuler-Haas Elec. Corp. v Wager Constr. Corp.*, 57 AD2d 707, 708; *see Sybelle Carpet & Linoleum of Southampton v East End Collaborative*, 167 AD2d 535, 536), those cases dealt with situations where a plaintiff-subcontractor was attempting to sue a defendant-owner pursuant to a contract between the owner and the general contractor. As highlighted in *R.H. Sanbar Projects v Gruzen Partnership* (148 AD2d 316, 319), those situations are distinguishable from the one at issue herein. Courts have routinely held that a subcontractor generally cannot be deemed an intended third-party beneficiary of a contract between an owner and a general contractor inasmuch as the owner, as promisee, generally does not intend to benefit any subcontractors thereafter hired by the general contractor (*see e.g. Port Chester Elec. Constr. Corp. v Atlas*, 40 NY2d 652, 655-656; *IMS Engrs.-Architects, P.C. v State of New York*, 51 AD3d 1355, 1357, *lv denied* 11 NY3d 706; *Palermo Mason Constr. v Aark Holding Corp.*, 300 AD2d 458, 459).

Also distinguishable is the situation where the subcontractor merely supplies materials, in which case the owner is generally deemed an incidental beneficiary (*see e.g. Amin Realty v K & R Constr. Corp.*, 306 AD2d 230, 231-232, *lv denied* 100 NY2d 515; *International Fid. Ins. Co. v Gaco W.*, 229 AD2d 471, 474). That is, perhaps, because the materials could, in theory, be used by anyone at any property. We note that the court herein mistakenly relied in part on the Court of Appeals' decision in *Fourth Ocean Putnam Corp. v Interstate Wrecking Co.* (66 NY2d 38), inasmuch as that case is likewise distinguishable. There, the defendant-subcontractors contracted with a municipality to demolish a structure owned by the plaintiff that had been deemed "a public nuisance and . . . a dangerous, unsafe fire hazard" (*id.* at 40). The Court held that the plaintiff-owner could not be deemed a third-party beneficiary of the contract between the municipality and the defendant-subcontractors because "the work was being performed not as a means of benefiting plaintiff but to remedy plaintiff's default in order to protect the public against a public nuisance" (*id.* at 45).

To the extent that the court interpreted our decision in *Ralston Purina Co. v McKee & Co.* (158 AD2d 969, 970) as holding that an express contractual provision was required, the court erred. An express contractual provision concerning third-party beneficiaries "is but an alternative factor upon which a court might base a finding that a certain party is, in fact, a third-party beneficiary" (*Key Intl. Mfg.*, 142 AD2d at 457; *see generally Fourth Ocean Putnam Corp.*, 66 NY2d at 45).

Thus, even assuming, arguendo, that the Isaacs defendants met their initial burden, we conclude that plaintiffs raised a triable issue of fact whether they were intended third-party beneficiaries of the contract between the Isaacs defendants and LSM. Although the contract between LSM and the Isaacs defendants does not appear in the record, plaintiffs submitted evidence establishing that, pursuant to that contract, the Isaacs defendants were to provide services directly to plaintiffs. Indeed, plaintiffs established that Henry Isaacs inspected the property before plaintiffs and LSM entered into their contract. The court, therefore, erred in granting the motion of the Isaacs defendants in its entirety.

Finally, contrary to plaintiffs' contention, they are not entitled to partial summary judgment on liability on the breach of contract cause of action because they failed to submit evidence establishing as a matter of law that they were intended third-party beneficiaries of the contract. We note that, without the benefit of the contract between LSM and the Isaacs defendants establishing the actual terms of the contract, we are unable to grant summary judgment to the Isaacs defendants or plaintiffs.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

569

CA 11-01462

PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

RUSSELL R. RAST AND DEBORAH RAST, INDIVIDUALLY
AND AS HUSBAND AND WIFE,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

WACHS ROME DEVELOPMENT, LLC,
DEFENDANT-APPELLANT-RESPONDENT,
SCOTT QUICK, DOING BUSINESS AS SCOTT QUICK
CONSTRUCTION, AND SCOTT QUICK CONSTRUCTION, INC.,
DEFENDANTS-RESPONDENTS.

GOLDBERG SEGALLA LLP, ALBANY (MATTHEW S. LERNER OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

DIXON & HAMILTON, LLP, GETZVILLE (DENNIS P. HAMILTON OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered April 15, 2011 in a personal injury action. The order granted in part the motion of plaintiffs for partial summary judgment and granted in part the cross motion of defendants Scott Quick, doing business as Scott Quick Construction, and Scott Quick Construction, Inc. for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in its entirety and denying the cross motion in its entirety and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries sustained by Russell R. Rast (plaintiff) when he fell from a roof to the ground. Defendant Wachs Rome Development, LLC (Wachs) hired plaintiff's employer as a general contractor to rebuild a strip mall owned by Wachs. Wachs also hired defendant Scott Quick, doing business as Scott Quick Construction (Quick), to repair the roof. At the time of the accident, Quick had started the roof repairs but had left the job site to work on a project in another state. Upon arriving at work, plaintiff was informed that the roof was leaking and ruining the newly-installed drywall. Plaintiff accessed the roof to investigate and found that the roofing membrane that Quick had left "hanging over the side of the building" had "folded over" from the wind and was causing water to pool on the flat roof and also to flow directly

inside the building. Plaintiff pushed the membrane back over the side of the roof and swept the water off the roof. He also contacted Quick, who indicated that he would not be back in town until that night. Several hours later, the membrane had again folded over, so plaintiff returned to the roof to repeat his earlier task. This time, when he finished the task and walked toward the scissor lift to return to the ground, he fell from the roof to the ground.

Supreme Court granted that part of plaintiffs' motion for partial summary judgment on liability on the Labor Law § 240 (1) claim against Wachs, but denied that part of the motion with respect to Quick and defendant Scott Quick Construction, Inc. We note that Quick, doing business as Scott Quick Construction, rather than defendant Scott Quick Construction, Inc., was hired to perform the work in question, but we nevertheless treat the two defendants as one entity, i.e., the Quick defendants, inasmuch as Quick testified at his deposition that the company began as a "d/b/a," was thereafter incorporated, and then returned to "d/b/a" status. The court further granted the cross motion of the Quick defendants in part by dismissing the Labor Law § 240 (1) and § 241 (6) claims against them. Wachs now appeals and plaintiffs cross-appeal. We conclude that the court should have granted plaintiffs' motion for partial summary judgment against both Wachs and the Quick defendants and should have denied the cross motion of the Quick defendants in its entirety. We therefore modify the order accordingly.

Addressing first plaintiffs' cross appeal with respect to the Quick defendants' cross motion, we agree with plaintiffs that the Quick defendants are liable as an agent of the owner "for injuries sustained in those areas and activities within the scope of the work delegated to [them]" (*Piazza v Frank L. Ciminelli Constr. Co., Inc.*, 12 AD3d 1059, 1060; *see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318). While the Quick defendants had no control over plaintiff's work, they had control over the area where plaintiff was injured. Plaintiffs are asserting a defective condition of the work site rather than the manner of the work, and the Quick defendants must therefore establish that they did not have "supervision or control of the safety of the area involved in the incident" (*Piazza*, 12 AD3d at 1061; *see Martinez v Tambe Elec., Inc.*, 70 AD3d 1376, 1377), which they failed to do.

Addressing next the appeal by Wachs and the cross appeal by plaintiffs with respect to plaintiffs' motion, we agree with plaintiffs that both Wachs and the Quick defendants are liable under Labor Law § 240 (1). It is undisputed that there were no safety devices in place to prevent the accident, and plaintiffs established that the absence of the safety devices was a proximate cause of plaintiff's injuries (*see Baker v Essex Homes of W. N.Y., Inc.*, 55 AD3d 1332, 1332; *Ewing v ADF Constr. Corp.*, 16 AD3d 1085, 1086), and Wachs and the Quick defendants failed to raise a triable issue of fact. Contrary to the contention of Wachs, plaintiff's conduct in accessing the roof to investigate and attempt to fix the problem was within the scope of his employment (*see Razzak v NHS Community Dev. Corp.*, 63 AD3d 708, 708-709; *Calaway v Metro Roofing & Sheet Metal*

Works, 284 AD2d 285, 286; *see also Destefano v City of New York*, 39 AD3d 581, 582). Plaintiff's employer testified at his deposition that plaintiff was responsible for job site safety, and when plaintiff was deposed he testified that he was concerned that the pooling water would cause the roof to collapse. Although Wachs correctly notes that the agreement between it and plaintiff's employer expressly excluded repairs and alterations to the roof, plaintiff was not repairing or altering the roof at the time of the accident. Instead, he was simply pulling back the roofing membrane that had blown over, and he was sweeping water off the roof. Wachs never prohibited employees of plaintiff's employer from accessing the roof, and indeed the record establishes that they had done so on previous occasions in furtherance of their duties in rebuilding the strip mall. Finally, we reject the contention of Wachs that plaintiff's actions were the sole proximate cause of his injuries. Where, as here, a plaintiff establishes that the absence of safety devices was a proximate cause of the plaintiff's injuries, the "plaintiff cannot be solely to blame for [the injuries]" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290; *see Gizowski v State of New York*, 66 AD3d 1348, 1349; *Ewing*, 16 AD3d at 1086).

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

572

CA 11-02460

PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

GERALD TANNER AND MELANIE TANNER,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

SHAWN M. RYAN AND SHANNON M. RYAN,
DEFENDANTS-APPELLANTS.

MITCHELL GORIS STOKES & O'SULLIVAN, LLC, CAZENOVIA (MARK D. GORIS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HARRIS BEACH PLLC, SYRACUSE (LAUREN H. SEITER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), dated March 4, 2011 in a personal injury action. The order denied the motion of defendants for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Gerald Tanner (plaintiff) when he fell from the roof of a home owned by defendants, allegedly as the result of defendants' negligence. Supreme Court properly denied defendants' motion for summary judgment dismissing the complaint. It is well established that a landowner has a common-law duty to provide workers with a reasonably safe place to work (*see Lombardi v Stout*, 80 NY2d 290, 294). In order to establish liability, a plaintiff must show that the landowner supervised and controlled the work (*see id.* at 295; *Luthringer v Luthringer*, 59 AD3d 1028). Here, plaintiff testified that Shawn M. Ryan (defendant) asked plaintiff and his brother to help perform a temporary fix on the roof of his house, and that defendant provided plaintiff and his brother with the necessary tools to complete the job. Additionally, plaintiff testified that defendant assisted in the work by passing plywood to plaintiff, and by cutting pieces of plywood that did not fit properly. Plaintiff also testified that defendant mocked his request for a rope to tie himself off, so plaintiff went up on the roof without a rope. Even assuming, arguendo, that defendants met their burden of establishing their entitlement to summary judgment, we conclude that plaintiffs' submissions raise an issue of fact whether defendant supervised or controlled plaintiff's work (*see Ennis v Hayes*, 152 AD2d 914, 915; *cf.*

Luthringer, 59 AD3d at 1030). We reject the contention of defendants that plaintiff's affidavit was a feigned attempt to avoid the consequences of his prior deposition testimony (*see Kalt v Ritman*, 21 AD3d 321, 323).

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

573

KA 11-00288

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, AND LINDLEY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THEODORE R. JENKINS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (VINCENT F. GUGINO OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. SMALL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered January 10, 2011. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class E felony, and aggravated unlicensed operation of a motor vehicle in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated and the matter is remitted to Erie County Court for further proceedings on the superior court information.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of felony driving while intoxicated (Vehicle and Traffic Law § 1192 [3]; § 1193 [1] [c] [i]) and aggravated unlicensed operation of a motor vehicle in the first degree (§ 511 [3] [a] [i]). At the time of the plea, County Court advised defendant that it could sentence him to a term of incarceration of up to four years or to probation, but it did not indicate to defendant that it was required to impose either a fine, or a term of incarceration, or both. At sentencing, the court imposed a sentence of probation and a fine on each count. We conclude that the court's failure to advise defendant of a direct consequence of his conviction requires vacatur of the plea.

Although "a trial court has no obligation to explain to defendants who plead guilty the possibility that collateral consequences may attach to their criminal convictions, the court must advise a defendant of the direct consequences of the plea" (*People v Catu*, 4 NY3d 242, 244). The Court of Appeals stated that "[d]irect consequences . . . are those that have 'a definite, immediate and largely automatic effect on defendant's punishment' . . . The direct consequences of a plea—those whose omission from a plea colloquy makes

the plea per se invalid—are essentially the core components of a defendant's sentence[, including] a fine" (*People v Harnett*, 16 NY3d 200, 205, quoting *People v Ford*, 86 NY2d 397, 403). Thus, inasmuch as the court failed to advise defendant that he must either be fined, or incarcerated or both, we conclude that the plea was not knowingly, voluntarily and intelligently entered. We therefore reverse the judgment and vacate the plea, and we remit the matter to County Court for further proceedings on the superior court information (*see People v Jordan*, 67 AD3d 1406, 1408; *People v Walker*, 66 AD3d 1460).

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

575

KA 08-02634

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, AND LINDLEY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

BURNIE E. DANIELS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered December 3, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal mischief in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

579

KA 09-01169

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, AND LINDLEY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEVON CAPERS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered June 17, 2008. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree, burglary in the first degree (two counts), criminal sexual act in the first degree (two counts), unlawful imprisonment in the first degree and petit larceny.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts each of burglary in the first degree (Penal Law § 140.30 [3]) and criminal sexual act in the first degree (§ 130.50 [1]). As the People correctly concede, County Court erred in permitting a police investigator to testify that defendant refused to answer certain questions and that the interview was thereafter terminated. That testimony implied that defendant had stopped answering the investigator's questions and had invoked his right to remain silent. "Neither a defendant's silence [nor his or her] invocation of the right against self-incrimination during police interrogation can be used against him [or her] on the People's direct case" (*People v Whitley*, 78 AD3d 1084, 1085). We nevertheless conclude, "in light of the evidence presented, . . . that any such error[is] 'harmless beyond a reasonable doubt' inasmuch as there is 'no reasonable possibility that the error[] might have contributed to defendant's conviction' " (*People v Murphy*, 79 AD3d 1451, 1453, *lv denied* 16 NY3d 862, quoting *People v Crimmins*, 36 NY2d 230, 237; *see People v Kithcart*, 85 AD3d 1558, 1559-1560, *lv denied* 17 NY3d 818).

"[D]efendant's contentions that the testimony of a [police] detective recounting the description of the perpetrator given by a witness constituted improper bolstering and inadmissible hearsay . . .

are unpreserved for [our] review[because] the defendant did not object to the testimony on those grounds" (*People v Walker*, 70 AD3d 870, 871, *lv denied* 14 NY3d 894; *see People v Everson*, 100 NY2d 609, 610; *People v Tevaha*, 84 NY2d 879, 880-881). In any event, that contention is without merit. The People were entitled "to provide background information [concerning] how and why the police pursued and confronted defendant" (*People v Tosca*, 98 NY2d 660, 661).

Contrary to defendant's further contention, the court properly concluded that the showup identification procedure was not unduly suggestive. Showup identification procedures are permitted where, as here, they are "reasonable under the circumstances--that is, when conducted in close geographic and temporal proximity to the crime--and the procedure used was not unduly suggestive" (*People v Brisco*, 99 NY2d 596, 597). "Here, the showup identification procedure took place at the scene of the crime, within 90 minutes of the commission of the crime and in the course of a continuous, ongoing investigation" (*People v Woodard*, 83 AD3d 1440, 1441, *lv denied* 17 NY3d 803; *see People v Harris*, 57 AD3d 1427, 1428, *lv denied* 12 NY3d 817).

We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

581

KA 09-00884

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, AND LINDLEY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SALVATORE GIANNI, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CHRISTINE M. COOK OF COUNSEL), FOR DEFENDANT-APPELLANT.

SALVATORE GIANNI, DEFENDANT-APPELLANT PRO SE.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (VICTORIA M. WHITE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered August 20, 2008. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment revoking the sentence of probation previously imposed upon his conviction of criminal contempt in the first degree (Penal Law § 215.51 [b] [v]) and imposing a sentence of imprisonment based on his violation of the terms and conditions of his probation. In appeal No. 2, defendant appeals from a judgment revoking the sentence of probation previously imposed upon his conviction of felony driving while intoxicated (Vehicle and Traffic Law § 1192 [3]; 1193 [1] [c] [former (i)]) and imposing a sentence of imprisonment based on his violation of the terms and conditions of his probation.

With respect to both appeals, defendant contends in his pro se supplemental brief that County Court failed to comply with the procedures for a probation violation hearing set forth in CPL 410.70 and that he was thereby deprived of due process. Defendant failed to preserve that contention for our review (*see generally People v Randall*, 48 AD3d 1080; *People v Ebert*, 18 AD3d 963, 964; *People v Zaborowski*, 16 AD3d 1058, 1058, *lv denied* 5 NY3d 772) and, in any event, defendant's contention is without merit (*see generally Randall*, 48 AD3d 1080; *Ebert*, 18 AD3d at 964). To the extent that defendant contends he was denied effective assistance of counsel because defense

counsel failed to advise him of his rights relative to the probation revocation hearing, that contention involves matters outside the record on appeal and must be raised by way of a motion pursuant to CPL article 440 (*see People v Johnson*, 81 AD3d 1428, 1428, *lv denied* 16 NY3d 896; *People v Balenger*, 70 AD3d 1318, 1318, *lv denied* 14 NY3d 885). With respect to the remaining instances of alleged ineffective assistance of counsel, we conclude based on the record before us that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147; *People v Haas*, 245 AD2d 825, 826).

Defendant failed to preserve for our review the further contention in his pro se supplemental brief that the court "erred in failing to order an updated presentence report before sentencing him following the revocation of probation" (*People v Carey*, 86 AD3d 925, 925, *lv denied* 17 NY3d 814). In any event, that contention is without merit inasmuch as the declarations of delinquency, the violation of probation reports and the testimony and documentary evidence produced at the revocation hearing "constituted the functional equivalent of an updated [presentence] report" (*id.* at 925 [internal quotation marks omitted]; *see People v Fairman*, 38 AD3d 1346, 1347, *lv denied* 9 NY3d 865; *People v Bennett*, 269 AD2d 401, *lv denied* 94 NY2d 916). Further, inasmuch as the same judge presided over both the original proceedings and the revocation proceedings, "[t]he court was fully familiar with any changes in defendant's status, conduct or condition since the original sentencing" (*Carey*, 86 AD3d at 925 [internal quotation marks omitted]; *see also People v Pomales*, 37 AD3d 1098, 1098-1099, *lv denied* 8 NY3d 949).

Contrary to the contention of defendant in his main and pro se supplemental briefs, the sentence is not unduly harsh or severe, particularly in light of defendant's history of unsuccessful probation attempts, his lengthy criminal record and his failure to control his alcohol consumption, despite many treatment referrals and three alcohol-related convictions (*see e.g. People v Hunter*, 62 AD3d 1207, 1208; *People v Smith*, 301 AD2d 744, 745). Further, "[g]iven the fact that defendant was initially allowed to plead to . . . reduced charge[s] and failed to abide by the favorable conditions of the plea, and taking into consideration his criminal behavior in violating his probation, we [discern] no abuse of discretion or extraordinary circumstances warranting a reduction of the sentence in the interest of justice" (*People v Feliciano*, 54 AD3d 1131, 1132-1133; *see People v Gurrola*, 43 AD3d 1230, 1231; *People v Grignon*, 186 AD2d 296, *lv denied* 81 NY2d 789).

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

582

KA 09-00885

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, AND LINDLEY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SALVATORE GIANNI, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CHRISTINE M. COOK OF COUNSEL), FOR DEFENDANT-APPELLANT.

SALVATORE GIANNI, DEFENDANT-APPELLANT PRO SE.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (VICTORIA M. WHITE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered August 20, 2008. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Same Memorandum as in *People v Gianni* ([appeal No. 1] ___ AD3d ___ [Apr. 20, 2012]).

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

592

CA 11-02280

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, AND LINDLEY, JJ.

RENEE JONES, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO SCHOOL DISTRICT,
RESPONDENT-RESPONDENT.

CAMPBELL & SHELTON LLP, EDEN (R. COLIN CAMPBELL OF COUNSEL), FOR CLAIMANT-APPELLANT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered August 11, 2011 in a personal injury action. The order denied the motion of claimant to renew her prior application for leave to serve a late notice of claim.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Claimant appeals from an order denying her motion to renew a prior application for leave to serve a late notice of claim. It is well settled that "[a] motion for leave to renew 'shall be based upon new facts not offered on the prior [application] that would change the prior determination' . . ., and 'shall contain reasonable justification for the failure to present such facts on the prior [application]' " (*Doe v North Tonawanda Cent. School Dist.*, 91 AD3d 1283, 1284). Here, "[t]he motion to renew was properly denied [inasmuch as claimant] failed to offer a valid excuse for failing to submit the new material on the original [application]" (*Linden v Moskowitz*, 294 AD2d 114, 116, *lv denied* 99 NY2d 505; *see Schilling v Malark*, 13 AD3d 1153, 1154).

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

VOLUNTARY ATTORNEY RESIGNATION

APRIL 20, 2012

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

HON. SALVATORE R. MARTOCHE, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

MATTER OF ROBERT J. SCAHILL, AN ATTORNEY, RESIGNOR. -- Voluntary resignation accepted and name removed from roll of attorneys. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, AND MARTOCHE, JJ. (Filed Apr. 10, 2012.)